

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE\*  
OF THE NAACP, et al., \*  
Plaintiffs, \* Case No. 1:18CV1034  
vs. \* Winston-Salem, North Carolina  
\* December 3, 2019  
\* 9:30  
ROY ASBERRY COOPER, III, in his\*  
official capacity as the \*  
Governor of North Carolina, \*  
et al., \*  
Defendants. \*  
\*\*\*\*\*

**EXPEDITED TRANSCRIPT**  
**ORAL ARGUMENT ON PRELIMINARY INJUNCTION MOTION**  
BEFORE THE HONORABLE LORETTA C. BIGGS  
UNITED STATES DISTRICT JUDGE

Lori Russell, RMR, CRR  
Official Court Reporter  
United States District Court  
P.O. Box 20593  
Winston-Salem, North Carolina 27120

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**P R O C E E D I N G S**

**THE COURT:** Madam Clerk, if you would call this matter for the Court, please.

**THE CLERK:** Yes, ma'am.

Calling case 1:18CV1034, North Carolina State Conference of the NAACP, et al., versus Cooper, et al.

**THE COURT:** Good morning.

(Simultaneous response from counsel.)

**THE COURT:** I understand we have had a switch of tables based on the number of attorneys that are present for the Plaintiffs.

Mr. Joyner, I understand that you're going to make introductions. Is that correct?

**MR. JOYNER:** That's correct, Your Honor.

**THE COURT:** All right. Let me hear from you, sir.

**MR. JOYNER:** Okay. Good morning, Judge Biggs.

**THE COURT:** Good morning.

**MR. JOYNER:** Good to be in your courtroom again --

**THE COURT:** Yes, sir.

**MR. JOYNER:** -- as always.

I'm Irving Joyner, for the record; and along with our cocounsels, we represent the North Carolina NAACP, the State Conference of the NAACP, and six of its local branches.

At this hearing, we seek to obtain a preliminary injunction to prevent the imposition of the voter ID requirement in

1 North Carolina, which violates Section 2 of the 1965 Voting  
2 Rights Act and the Fourteenth and Fifteen Amendments to the  
3 Constitution.

4 Your Honor, I want to just introduce counsel to you.  
5 Beginning on the end, Jeremy Karpatkin of Arnold Palmer --  
6 Porter. I'm thinking about the drink.

7 **THE COURT:** Now, I'm happy for you to introduce them,  
8 but if it would be easier -- you've got a lot of counsel over  
9 there. If it would be easier for you to stand and tell me who  
10 you are and who you're with, that would be helpful.

11 **MR. JOYNER:** Okay.

12 **THE COURT:** All right.

13 **MR. KARPATKIN:** Jeremy Karpatkin with Arnold & Porter  
14 for Plaintiffs the North Carolina Conference of the NAACP.

15 **THE COURT:** Thank you, sir.

16 **PRESTON SMITH:** Good morning, Your Honor. Preston  
17 Smith from Arnold & Porter.

18 **THE COURT:** Good morning.

19 **MS. ROBLEZ:** Good morning, Your Honor. Kathleen  
20 Roblez from Forward Justice.

21 **THE COURT:** Yes.

22 **MS. HAIR:** Good morning. Penda Hair from Forward  
23 Justice for the Plaintiffs.

24 **MR. COOPER:** Good morning, Your Honor. James Cooper  
25 from Arnold & Porter.

1           **THE COURT:** Yes.

2           **MS. SWAIN:** Good morning, Your Honor. Caitlin Swain  
3 from Forward Justice.

4           **MR. ULIN:** Good morning, Your Honor. John Ulin from  
5 Arnold & Porter, proudly representing the NAACP Plaintiffs here  
6 this morning.

7           **THE COURT:** Yes.

8           **MR. JOYNER:** Your Honor, our Plaintiffs are here as  
9 well and are seated in the gallery. Representing the State  
10 Conference of the NAACP is Dr. T. Anthony Spearman, who is  
11 here; representing the Greensboro branch of the NAACP, Reverend  
12 Cardes Brown; representing the High Point NAACP is James Adams;  
13 and the Moore County branch, Linda Watkins-McSurely; and  
14 Dr. Gregory Hairston of the Stokes County NAACP; and Reverend  
15 Carlisle of the Winston-Salem/Forsyth branch of the NAACP; and  
16 President Anna Richards of the Chapel Hill-Carrboro NAACP; and  
17 we have also Armenta Eaton, who is one of the former plaintiffs  
18 in the *McCrory* case and the daughter of Rosanell Eaton.

19           With the Court's approval, the presentation from the  
20 Plaintiffs' side will probably consume most of the morning; and  
21 following arguments from the State, then we will have some  
22 rebuttal as well. But the presentation on behalf of the  
23 Plaintiffs will be made by Attorney Swain-McSurely and John --  
24 Attorney John Ulin. Attorney Swain will discuss the intent  
25 components of our case and then Attorney Ulin will discuss the

1 effects component of the case and we're going to start off with  
2 some opening --

3 **THE COURT:** Before you do an opening, what I would  
4 like is for -- to allow the other side to introduce their  
5 counsel and then I'm going to tell you how the -- we're going  
6 to proceed from this point forward.

7 **MR. JOYNER:** That's fine, Your Honor.

8 **THE COURT:** All right. Thank you, Mr. Joyner.  
9 Yes.

10 **MS. VYSOTSKAYA:** Your Honor, my name is Olga  
11 Vysotskaya. I'm a Special Deputy Attorney General of the  
12 North Carolina Department of Justice. My cocounsel, my  
13 colleague, is Mr. Paul Cox. He also works for the Department  
14 of Justice. And we both represent the Defendants here, the  
15 North Carolina State Board of Elections and the officials who  
16 were sued in their official capacities as well.

17 And seated next to us is the acting general counsel for the  
18 State Board of Elections, Katelyn Love.

19 We are willing to take whatever instructions the Court  
20 gives us as far as how the presentations will go.

21 **THE COURT:** Tell me your last name again, please.

22 **MS. VYSOTSKAYA:** My name is Vysotskaya, my last name.  
23 Vysotskaya.

24 **THE COURT:** All right. Thank you. Thank you so very  
25 much.

1           **MS. VYSOTSKAYA:** Just generally, Your Honor, we have  
2 divided our presentations, but we will take whatever directions  
3 the Court will give us. It was my intent to talk about  
4 discriminatory intent and my cocounsel was going to talk about  
5 the effects. But whatever the Court will order us to do.

6           **THE COURT:** All right. Thank you.

7           What I believe would be most helpful to the Court is for us  
8 to follow the pattern of the showing that is required for a  
9 preliminary injunction; and I would like to divide up the  
10 arguments into the Section 2 claims, as well as -- and the  
11 constitutional claims with respect to the merits.

12          What I think I would like to do is hear from each side with  
13 respect to the merits before we go forward on the irreparable  
14 harm, the public interest, and the balance of the equities. I  
15 leave it up to each side how you wish to present this to me,  
16 but I am telling you what I believe this Court needs in order  
17 to rule in the way that I need to rule on the case.

18          I will tell you, to the Plaintiffs, I have not foreclosed  
19 the possibility or potential of testimony -- oral testimony. I  
20 did not have enough information for me to make a determination  
21 if that would be helpful. What might be helpful as you go  
22 through your discussion, identify those areas in which it is  
23 that you would like to give testimony and what you forecast  
24 that testimony would show. That will help the Court make the  
25 determination of whether or not that is possible.

1       Now, I understand that my order indicated that this  
2 particular day in this hearing would be oral argument. I have  
3 also noted the number of conflicts that you have shared with  
4 the Court. However, this case, as can be seen from those who  
5 are interested in this courtroom, is a very important case. It  
6 is your priority right now and so the Court will make the  
7 determination on whether or not it would be helpful to the  
8 Court to hear oral testimony.

9       All right. Now, I cut you off, Mr. Joyner. I'm going to  
10 allow you to continue.

11       I will say one other thing. I have read the briefs, I have  
12 read much of the case law associated with those briefs, and I  
13 have read most of the expert -- but it would be helpful as you  
14 go through your argument to point the Court to specific  
15 evidence in the record that will support the positions that you  
16 are arguing to the Court.

17       With that said, Mr. Joyner, yes, sir, what would you like  
18 to share with me?

19               **MR. JOYNER:** Thank you, Your Honor, for those  
20 instructions. I'm just going to turn it over to Attorney Ulin  
21 and we'll go into the format that you suggested.

22               **THE COURT:** All right. Thank you so much.

23               **MR. ULIN:** Thank you, Your Honor.

24       And thank you, Mr. Joyner.

25       Your Honor, we will follow your direction and take on the



1 preliminary injunction factors in order beginning, as you  
2 suggested, with the question of likelihood of success on the  
3 merits.

4 We come before the Court on a motion to enjoin the  
5 implementation of Senate Bill 824, North Carolina's latest  
6 photo voter ID law, because it violates Section 2 of the Voting  
7 Rights Act and the Fourteenth and Fifteenth Amendments. SB824  
8 is a racially-motivated voter suppression law. It's intended  
9 to prevent people from voting and that's exactly what it does.

10 Principal questions before this Court are who did the  
11 General Assembly intend to prevent or deter from voting and who  
12 is actually prevented and deterred; and the answers to those  
13 questions are the same: Black and Latino voters in  
14 North Carolina.

15 My colleague, Caitlin Swain, will address how the evidence  
16 before this Court demonstrates that the General Assembly  
17 enacted SB824 with the intent to entrench the majority party by  
18 deterring black and Latino voters, among others, who tend to  
19 support the other party from voting.

20 I will then follow and address how the evidence  
21 demonstrates that SB824 interacts with social and historical  
22 conditions in North Carolina to cause discrimination in such a  
23 way as to deprive minority voters of an equal opportunity to  
24 participate in the political process, and I will also explain  
25 why the new voter ID law cannot be implemented in the three

1 months -- and that's all there is -- left between today and the  
2 March 2020 North Carolina primaries without violating the  
3 voting rights of minority voters.

4 In these ways we'll demonstrate that Plaintiff has shown a  
5 likelihood of success on the merits of their discriminatory  
6 intent claim under Section 2 of the Voting Rights Act, and on  
7 the coextensive Fourteenth and Fifteenth Amendment claims, and  
8 also on the discriminatory results claim under Section 2.

9 We'll conclude then, as Your Honor suggested, at a later  
10 portion of the hearing by addressing the other preliminary  
11 injunction factors.

12 **THE COURT:** Let me ask you this question: Why did you  
13 wait eight months to bring your preliminary injunction motion?

14 **MR. ULIN:** Your Honor, the voter ID law in  
15 North Carolina was suspended for 2019.

16 **THE COURT:** I do understand that. But by virtue of  
17 bringing it at this time, do you not put the other side at a  
18 disadvantage? I suspect -- and I have not heard their  
19 evidence, but I'm sure they have done substantial efforts  
20 toward preparing for the launch of this. So I don't really  
21 understand why you waited so long to bring this preliminary  
22 injunction motion.

23 **MR. ULIN:** A couple of points, Your Honor.

24 First of all, in terms of waiting, as it were, to bring the  
25 motion, we're seeking to enjoin the first implementation of the

1 law. The motion would have been --

2 **THE COURT:** I understand, in March.

3 **MR. ULIN:** -- filed earlier had the intended rollout  
4 of the law in 2019 actually proceeded, but that was suspended.  
5 Therefore, we felt it was important to take time to develop a  
6 full record and the full record is one of the things that  
7 distinguishes this case from other cases involving voter --  
8 challenges to voter identification laws, to develop the  
9 evidence that would demonstrate to this Court both why the law  
10 was enacted with discriminatory intent, why the law has a  
11 discriminatory effect, and why the so-called ameliorative  
12 provisions incorporated in the law don't remedy either the  
13 discriminatory intent or the discriminatory impact.

14 And it took quite some time to amass that record which is  
15 now before Your Honor and we believe it was important to take  
16 that time. And the State afforded us, by virtue of suspending  
17 the law for 2019, the opportunity to make that record and bring  
18 the matter before the Court in a manner that's sufficiently  
19 timely to get this case resolved before the implementation of  
20 the law in 2020.

21 With respect to the State's preparations, that's going to  
22 be an important aspect of our argument and I would just offer  
23 the Court two points. One is -- and I will go into this in  
24 some detail and there is evidence in the record that will  
25 support the points that I'm making.

1       The State's efforts at implementation of the law slowed  
2 dramatically and many of them were suspended entirely when the  
3 2019 -- when the legislature earlier in 2019 passed a bill  
4 suspending voter ID for this year, pushing the implementation  
5 to March of next year. That's, in fact, a significant reason  
6 why we'll argue later today that the law can't possibly be  
7 implemented in the next three months, because the State and the  
8 SBOE have not undertaken the steps necessary to implement it in  
9 an orderly fashion and to inform the public and educate  
10 election officials. And that can't be accomplished in a  
11 three-month time period.

12       Your Honor asked the question about the State making  
13 efforts to implement the law. We will argue that a lot of  
14 those steps in fact have not been taken, have been deferred,  
15 are works in progress, and will leave insufficient time for --  
16 for implementation.

17       The other point I would make is the SBOE's executive  
18 director, in her declaration before the Court, indicated that  
19 we have until at least December 31st -- and the Court can test  
20 the bounds of what that means -- before she would need to make  
21 changes to the State's information systems affecting -- State's  
22 information -- State's collection information systems that she  
23 claims would be necessary to implement voter ID.

24       In other words, what I'm saying is even the State's own  
25 witness has suggested there is sufficient time for the Court to

1 digest the information that's been submitted to you throughout  
2 the fall, come to a decision by -- during the month of  
3 December -- whether that's a -- whether that's an initial  
4 decision or your full opinion will remain to be seen -- and  
5 still have SBOE react in a way that allows them to stand down  
6 on implementing the voter ID if the Court finds, as we believe  
7 the evidence will demonstrate to you, that this law can't be  
8 implemented because it violates the Voting Rights Act and the  
9 federal Constitution.

10 **THE COURT:** All right. Before you proceed, I did ask  
11 this -- I want to give the other side an opportunity to speak  
12 to that issue.

13 I know that is a part of your presentation and would  
14 generally come later, but I want to give you that opportunity  
15 to speak to that issue, if you wish to at this time.

16 **MS. VYSOTSKAYA:** Yes, Your Honor. Thank you.

17 That delay of eight months that Your Honor have referenced  
18 earlier is one important factor why we believe the Court should  
19 deny the request for preliminary injunction in this case. The  
20 State has started undertaking significant -- has started taking  
21 significant steps towards implementation of SB824.

22 Those steps included holding two seminars per each county  
23 in North Carolina, educating voters and the local officials on  
24 the requirements of the voter ID law. Those seminars have been  
25 conducted already and -- and so that step has been done.

1       The State already has prepared and mailed about 700,000  
2 mailings to those voters that may lack DMV-issued IDs and  
3 notified those voters about voter ID requirements and told  
4 those voters how to obtain the voter IDs that are necessary for  
5 voting if they lack them.

6       The State is in the process this week -- the mailings are  
7 already at the mailers -- mailing vendor facility for all the  
8 mailings to go to all residences in North Carolina that would  
9 inform everybody about the requirements of the voter ID law.  
10 Those are printed, at the mailers now. They will be mailed  
11 today or at some point later this week.

12       The State has developed a number of temporary rules  
13 regarding the voter ID requirement. The State has started  
14 issuing free voter ID cards to the voters in North Carolina,  
15 multiple other steps that we could talk about.

16       But there were multiple steps that have been undertaken by  
17 the State Board to prepare for this; and if those efforts are  
18 halted right now and if they're later, let's say, reinstated  
19 and the law is reinstated, the voters will be harmed, the State  
20 Board will be harmed, part of the voter educational campaign  
21 will not take place.

22       So we believe that question that Your Honor asked is very  
23 important question in determining whether a preliminary  
24 injunction should issue and weighs against Plaintiffs'  
25 position.

1 I don't know, Your Honor, if you would like me to respond  
2 to the beginning --

3 **THE COURT:** Nothing further. I just did not want to  
4 not allow you the opportunity to respond to that specific  
5 question that I asked.

6 **MS. VYSOTSKAYA:** Thank you.

7 **THE COURT:** All right. Thank you.

8 Yes, sir. I apologize for interrupting you. If you would  
9 proceed.

10 **MR. ULIN:** You need not apologize to me, Your Honor.

11 **THE COURT:** Yes.

12 **MR. ULIN:** I have nothing to add to my introduction  
13 and we'll take up some of the points made by opposing counsel  
14 when they arise in the course of our argument, particularly  
15 about the rushed implementation of SB824 and how that can't  
16 possibly go forward without infringing the voting rights of  
17 black and Latino voters throughout the state of North Carolina,  
18 and the critical importance of preserving those rights,  
19 notwithstanding any of the interim efforts that the State has  
20 begun but as to which it has quite a long way to go yet in  
21 attempting to implement that law in the incredibly short period  
22 of time that's left.

23 So without further ado, I'm going to turn the microphone to  
24 my colleague, Ms. Swain, who will address the issue of the  
25 State's enactment of this law with racially discriminatory

1 intent.

2 **MS. SWAIN:** Good morning, Your Honor.

3 **THE COURT:** Good morning.

4 **MS. SWAIN:** Again, my name is Caitlin Swain with  
5 Forward Justice representing the North Carolina NAACP  
6 plaintiffs. I will be reviewing this morning the overwhelming  
7 evidence in support of Plaintiffs' likelihood of success as to  
8 the racial intent claim under Section 2 of the Voting Rights  
9 Act.

10 As Your Honor knows, we are here in Winston-Salem today  
11 under a challenge to SB824, a law passed in December 2018, just  
12 over a year ago, which will require otherwise eligible  
13 required -- registered voters in North Carolina to show one of  
14 a limited number of photo identification cards in order to cast  
15 a ballot and have it counted in North Carolina elections in  
16 2020.

17 Plaintiffs contend that SB824 is independently and fatally  
18 infected by the same race -- racially discriminatory intent as  
19 its predecessor bill, HB589. That law was struck down by the  
20 Fourth Circuit in the controlling case here, *North Carolina*  
21 *NAACP v. McCrory*.

22 In *McCrory*, the Fourth Circuit found that the 2013 General  
23 Assembly enacted 589, including its photo identification  
24 requirement, with racial intent, in contravention of the  
25 protections of the U.S. Constitution and Section 2 of the



1 Voting Rights Act. The Court held there that the evidence  
2 unmistakably revealed that the General Assembly used HB589 to  
3 entrench itself. It did so by targeting voters based on race  
4 and it targeted African American voters with almost surgical  
5 precision.

6 Before reviewing the *Arlington Heights* factors and some of  
7 the key evidence that we think will be helpful for Your Honor  
8 to note I think that is in the record, I want to highlight four  
9 points which I believe go to the heart of Plaintiffs' intent  
10 case and show that racial intent motivated, at least in part,  
11 the General Assembly's enactment of SB824, which is our burden.

12 First, voter ID passed in 2018 did not emerge in a vacuum.  
13 There is an unbroken line between SB824 and the last  
14 decades-long sequence of illegal actions taken by the  
15 Republican-controlled General Assembly to entrench its own  
16 power, including HB589. The systematic official efforts by  
17 this State and these decision-makers to depress and suppress  
18 the voting power and participation of a surging African  
19 American electorate just when African Americans, in tandem with  
20 an emerging Latino electorate in this state, were beginning to  
21 exercise that power matters. These actions are indisputably  
22 highly relevant to this Court's consideration of the  
23 decision-makers' motivations in enacting SB824.

24 Second, the Assembly stated rationales reveal pretext. The  
25 record shows that this General Assembly had no legitimate

1 actual nonracial explanation to justify SB824's enactments and  
2 the Defendants have not proffered one. In *McCrory*, the Fourth  
3 Circuit ruled that the legislators tried unsuccessfully to,  
4 quote, conceal the true motivation by purporting to cure  
5 problems that do not exist.

6 In 2018, recycled bare statements by legislative leadership  
7 asserting that the motivation for SB824 is, quote, prevention  
8 of voter fraud or the promotion of voter confidence, must be  
9 weighed against volumes of the State's own meticulously  
10 produced bipartisan evidence, including new evidence that was  
11 before the legislature in 2018, demonstrating the opposite.

12 Facts outweigh fiction. The evidence before the Assembly  
13 was that voter impersonation is so vanishingly rare that it is  
14 a statistical zero in this state. The General Assembly's  
15 assertions are more than suspect under those facts. They  
16 reveal a lie and once again conceal another motive.

17 Third, the constitutional amendment in this case, Your  
18 Honor, does not break the through line. The record does not  
19 show that the constitutional amendment represented an effort to  
20 abide by judicial rulings but, rather, to circumvent them. The  
21 enactment of SB824 features troubling new indicia of intent in  
22 the sequence of events preceding it, which I'm going to walk  
23 through shortly; and the North Carolina General Assembly  
24 leadership never accepted the *McCrory* holding, admitted it was  
25 their intent to circumvent that ruling, then immediately and

1 persistently acted to do so.

2 Fourth and finally, SB824 fatally fails to remedy racially  
3 disparate impacts and reenacts the core discriminatory  
4 provisions of 589. Black and Latino voters will bear the  
5 results of this legislative action more heavily than white  
6 voters in this state.

7 I turn now to the legal standard for the racial intent  
8 analysis under Section 2 and I will move through this quickly  
9 and, Your Honor, please tell me to move along if you would like  
10 me to.

11 A facially neutral election law like the one at issue here  
12 constitutes intentional race discrimination where  
13 circumstantial and direct evidence of intent show the law's  
14 impermissible purpose. In instructing courts to consider the  
15 broader context surrounding the passage of legislation, the  
16 court in *McCrary* recognized, and under *Arlington Heights* it's  
17 clear, that outright admissions of impermissible racial  
18 motivation are infrequent and plaintiffs often must rely on  
19 other evidence.

20 Racial intent is a question of fact requiring a sensitive  
21 and comprehensive analysis of the evidence, including  
22 credibility determinations, and the drawing of legitimate  
23 inferences from scrutiny of the record evidence; and analysis  
24 of intentional discrimination requires looking at the broad  
25 context and process of decision-making.

1 As Your Honor has already shared, if you determine that  
2 additional live testimony would support the Court's fact  
3 finding, we are prepared and ready to bring live witnesses; and  
4 I will try as I move through to forecast some of the evidence  
5 as you suggest that would potentially be -- that we would  
6 potentially be bringing forward.

7 A few other facts that I think are key in this case to an  
8 intent analysis: First, racial discriminatory intent need not  
9 be the sole or primary factor, just a motivating factor, behind  
10 an enactment. It's not the same as a racial animus. It may be  
11 present -- and this is under the *McCrary* precedent. It may be  
12 present where decision-makers engage in the intentional  
13 targeting of a particular race's access to the franchise  
14 because its members vote for a particular party in a  
15 predictable manner even absent any evidence of race-based  
16 hatred and it is no defense that racial discrimination may be  
17 done for partisan aims.

18 To assess the evidence of intent, the Court applies the  
19 framework provided by the traditional *Arlington Heights*  
20 factors. I've listed them here on this demonstrative. I am  
21 hoping this demonstrative is going to serve to illuminate as I  
22 go through some of the key points that I'm making and I will  
23 direct Your Honor as I continue forward to what -- the  
24 underlying exhibits that are referenced.

25 Those five factors here -- the historical background

1 preceding the law, the sequence of events leading to the  
2 passage of the bill, departures from substantive or procedural  
3 practice, legislative history, and whether the decision bears  
4 more heavily on certain racial groups -- are going to be the  
5 framework that I'm going to use to walk briefly through key  
6 evidence in Plaintiffs' case.

7       At the conclusion of determining whether there is a racial  
8 intent that is a motivating purpose, of course there is a  
9 burden shift. In this holistic -- after this holistic review,  
10 the burden shifts to the law's defenders to demonstrate that  
11 the law would have been enacted without this factor under  
12 *Hunter v. Underwood*. When determining if this burden has been  
13 met, courts must be mindful under the *McCrory* precedent that  
14 racial discrimination is not just another competing  
15 consideration. Courts must scrutinize the actual nonracial  
16 motivations to determine whether they alone can justify the  
17 legislature's choices. We submit here, Your Honor, that that  
18 is not the case.

19       I'll begin briefly with a historical background preceding  
20 the law; and in some instances, there is just no contest  
21 between the two parties. This is one of them. The State does  
22 not contest the long, sordid history of racial discrimination  
23 in this state because they cannot. As found by the Court of  
24 Appeals, every stratagem ever devised for race-based voter  
25 suppression has been used to diminish black voting power in

1 North Carolina.

2 Professor Jim Leloudis of UNC Chapel Hill has submitted an  
3 extensive report to Your Honor and you'll see here in the  
4 demonstrative just a short example -- a short illustration of  
5 the Civil War to disenfranchisement period, of cyclical  
6 increase in black voter participation met by immediate efforts  
7 to disenfranchise, then a similar very small effort in the Jim  
8 Crow period; and then you'll see it moves us up to the Civil  
9 Rights movement and aftermath, which is the most recent history  
10 that we find ourselves in today.

11 The efforts in this state to disenfranchise black voters  
12 wiped out black political power for the majority of  
13 North Carolina's history and resulted in enduring social and  
14 economic disparities by race, which Your Honor is familiar with  
15 and is in the record.

16 While fragile, important gains were made after the passage  
17 of the Voting Rights Act. During this period, though, 50  
18 lawsuits were filed against the State to protect African  
19 American voting rights; and under Section 5, preclearance, the  
20 Department of Justice objected to more than 60 election law  
21 changes.

22 I turn now to the sequence of events leading up to the  
23 challenged decision, which is also a story about the recent  
24 history in this state. North Carolina's history of racial  
25 discrimination and voting is not just in the past. This decade

1 in North Carolina shows a remarkably brazen record of racial  
2 discrimination by the North Carolina General Assembly and this  
3 recent history is essential to the sequence of events leading  
4 up to the ultimate passage of SB824.

5 Since the turn of the decade when Republicans gained  
6 control of both chambers for the first time in nearly a  
7 century, the North Carolina General Assembly has repeatedly  
8 violated the Constitution and the Voting Rights Act.

9 First, in 2011 the legislature enacted three redistricting  
10 plans following the 2010 census. This was the State House, the  
11 State Senate, and federal congressional districts. They then  
12 in 2013 adopted -- I'm sorry. At the same time -- I want to  
13 make sure I get this right for Your Honor. At the same time,  
14 in 2011, the General Assembly made its first attempt at passing  
15 a photo voter ID law. That law was vetoed by Then-Governor  
16 Beverly Perdue, who found it to have racially discriminatory  
17 effects.

18 2013 also brought forth HB589, passed directly on the heels  
19 of the June *Shelby* decision, just as North Carolina was freed  
20 from DOJ preclearance oversight. Lawsuits followed; and as the  
21 decades progressed, the federal courts then found that all of  
22 these acts by the North Carolina General Assembly illegally  
23 violated the Constitution by discriminating against black  
24 voters.

25 And you'll see this here on the slide. In 2016, the Fourth

1 Circuit issued its decision in *North Carolina NAACP v. McCrory*.

2 In 2017, a three-judge panel in *Harris v. McCrory* found  
3 that the congressional maps constituted an illegal racial  
4 gerrymander. Likewise, in 2017 in *Covington v. North Carolina*,  
5 a different three-judge court found that the State House and  
6 Senate maps each constituted illegal racial gerrymanders.

7 I turn the Court's attention briefly back to the *McCrory*  
8 decision. In that case, the Fourth Circuit identified that  
9 only a few months ago in that decision, only a few months ago,  
10 a three-judge court addressed a redistricting plan adopted by  
11 the same General Assembly that enacted HB589. The Court held  
12 there that race was the predominant motive in drawing two  
13 congressional districts in violation of Equal Protection  
14 Clause. And this is the key quote from the *McCrory* decision:  
15 Contrary to the District Court's suggestion, a holding that a  
16 legislature impermissibly relied on race certainly provides  
17 relevant evidence as to whether race motivated other election  
18 legislation passed by the same legislatures.

19 I turn now to the second element of the sequence of events,  
20 the context in North Carolina that incentivized these racially  
21 discriminatory laws. Key to understanding the motivations of  
22 the Republican majority in the General Assembly is this  
23 dramatic shift from roughly 2004 to 2018 in North Carolina's  
24 relative white voting strength, as opposed to black and Latino  
25 voting strength, a fact also uncontested by the State.



1        Since roughly 2004, this state witnessed an unprecedented  
2 growth of voter registration and political participation by  
3 black voters. Of the 1.46 million voters on North Carolina's  
4 voter roll between 2000 and 2012, 35 percent were African  
5 Americans, even though they only constituted 20 percent of the  
6 voting age population in 2000. By 2008, African American  
7 registration rates rose to 94.9 percent of the African American  
8 voting age population, as compared with 90.7 percent of whites.  
9 Saying this another way, for the two elections -- 2008 and 2012  
10 general elections, African American voter participation rates  
11 exceeded the whites' voter participation rates for the first  
12 time in modern history in this state.

13        That context matters, and the trends in this major shift in  
14 relative voting strength by race continue when we examine the  
15 period that took place between 589 and the passage of SB824.  
16 So that is between 2004 and 2018.

17        I won't belabor this because Your Honor has it in front of  
18 you, but I do want to note the dramatic shifts here as analyzed  
19 by American University's professor, Dr. Lichtman, who submitted  
20 an extensive report for Your Honor.

21        The percentage of registered voters in North Carolina who  
22 identify as white plunged during this period, from 77.9 percent  
23 in January 2004 to 69.1 percent in June 2008, and you'll see it  
24 here on the Table 11. In contrast, the percentage of  
25 registered African American voters in North Carolina rose from

1 19.4 percent in January 2004 to 22.1 percent in June 2018, an  
2 increase of almost 14 percent in black voter strength.

3       However, the most striking increase during this period,  
4 which is essential to understanding the context that this  
5 decision was made in, was an increase in minority registrants  
6 who identified as mixed race, Latino, Asian or American Indian.  
7 The percentage of registered "other" minorities in this state  
8 soared from 2.8 percent in January 2004 to 8.8 percent in  
9 June 2018. This represents an increase of 214 percent in voter  
10 strength for this nonwhite group.

11       This change in white versus nonwhite voting strength  
12 interacts with an uncontested reality about the voting context  
13 in North Carolina where the State admits that, first, there is  
14 extreme racially polarized voting in this state which persists  
15 today; and, second, race is a better predictor of voting  
16 behavior in North Carolina today than any other salient  
17 characteristic, that is, sex, age, education, and income, and  
18 even better than party affiliation or registration.

19       In this context, the Republican majority could preserve and  
20 expand its power by depressing and suppressing the voting  
21 strength of African Americans and other people of color through  
22 racial gerrymanders and through vote denial. That is the  
23 political payoff for racial discrimination in voting. That  
24 context and that potential payoff continue to exist, and the  
25 incentive to engage in racial discrimination had even increased

1 by the time the North Carolina General Assembly designed its  
2 two-step process to pass a new version of photo voter ID, which  
3 is what I will turn to now.

4 This third element of the sequence of events is important.  
5 It is the connection drawn by the General Assembly's leaders  
6 themselves between HB589, the *McCrory* decision, and the  
7 decision to propose a voter ID constitutional amendment, and  
8 the ultimate passage of 824.

9 Plaintiffs -- and I should be clear, Your Honor.

10 Plaintiffs do not contend that the Fourth Circuit's finding of  
11 racial intent in 589 automatically carried forward into SB824.  
12 Rather, we have shown through the evidence, including the  
13 legislative leaders' own statements, that the legislators'  
14 racial intent did not change between the enactment of 589 and  
15 the enactment of SB824.

16 Immediately after the Fourth Circuit's decision striking  
17 down 589, Senate Leader Phil Berger and House Speaker Tim Moore  
18 issued a statement calling it a politically motivated ruling by  
19 three partisan Democrats. They were defiant, not repentant,  
20 after being found to violate the law based on racial intent.  
21 The General Assembly leaders first publicly revealed the  
22 constitutional amendment strategy on the same day the Supreme  
23 Court announced its denial to review the decision. That's  
24 May 15th, 2017.

25 As described in the *Raleigh News & Observer*, within hours

1 of the release of the Supreme Court's cert denial, the  
2 North Carolina Republican party leaders were calling for a new  
3 law that would incorporate some of the same ideas, but they  
4 wanted to package the same ideas in a manner that they thought  
5 could withstand judicial review. They were not looking to  
6 eliminate racial intent. They were trying to repackage it  
7 within a constitutional amendment.

8 By July 2017, media reported that State legislators are now  
9 working on another voter ID bill that would be taken to voters  
10 as a constitutional amendment. This local reporting was  
11 confirmed by Representative David Lewis, who is the chairperson  
12 of the Elections committee and the key -- the key legislator in  
13 this case who links at -- HB589 to SB824.

14 David Lewis stated that the purpose of the constitutional  
15 amendment was -- and I quote -- to mute future court  
16 challenges. Significantly, Lewis, as the chair of the House  
17 Elections committee, was also the General Assembly's key point  
18 person on all election-related issues, including the  
19 gerrymanders themselves.

20 A year later, in June 2018, when the General Assembly took  
21 up the proposal of a constitutional amendment, Representative  
22 Lewis explained his support of the amendment by stating, "I  
23 think the judge was wrong," referring to the Court of Appeals  
24 decision on HB589, and opining, "I think we would have won that  
25 case if it had gone to the Supreme Court."

1       Finally, in a direct statement connecting the General  
2 Assembly's motivation for the constitutional amendment to the  
3 racially-motivated HB589, Lewis explained, "The reason we are  
4 asking voters if they want to do this or not is, frankly, we  
5 think we passed a good law before."

6       To be clear, this statement in 2018 by the leading GOP  
7 sponsor of a constitutional amendment and sponsor of SB824 that  
8 the law the Fourth Circuit found to be unconstitutional and in  
9 violation of the Voting Rights Act because it discriminated on  
10 the basis of race was a good law.

11       All of these North Carolina General Assembly leaders from  
12 the issuance of the *McCrory* decision to the enactment of the  
13 statutes proposing the constitutional amendment show that SB824  
14 was developed not to cure the flaws in 589 that rendered it  
15 discriminatory but to pass essentially the same law and render  
16 it immune from judicial review.

17       A few other points that I want to just highlight about the  
18 constitutional amendment and I'm happy -- we'll be happy to  
19 speak more about this later in the presentation, if helpful.  
20 The amendment provides no blank check, voter stamp of approval  
21 in support of the discrimination of SB824.

22       Other circumstances of the constitutional amendment's  
23 passage do matter here. It was passed by a supermajority  
24 obtained by maps found to be the most extensive racial  
25 gerrymander seen by a federal court. In a highly unusual

1 process, it included no blueprint of implementing legislation  
2 for voter's approval. Voters could only vote for what was  
3 before them. They were not voting for 824.

4 And the amendment too suffered from its own infirmities in  
5 its rushed process. Five other constitutional amendments  
6 simultaneously were considered and placed on the ballot.  
7 Though there was no policy reason to wait -- to do it at this  
8 time, the amendment was passed at the very end of the  
9 legislative session forcing rushed deliberation and a rushed  
10 voter education period as well.

11 Also worth noting, racial polarization and voting on the  
12 amendment itself has been identified in this record where  
13 African American voters overwhelmingly opposed the amendment.

14 Finally, prior to the constitutional amendment, there were  
15 misleading statements made by legislative leadership regarding  
16 exceptions that might be considered. For example, House  
17 Speaker Tim Moore stated in 2018 that he could support a voter  
18 ID law that included nonphoto forms of ID. Yet in the adoption  
19 of the implementing SB824, he opposed an amendment that would  
20 allow use of nonphoto IDs; and the law's enacted does not allow  
21 for nonphoto IDs.

22 I turn now to the fourth element of the sequence of events  
23 that the legislators -- that show that the legislature's  
24 actions in 2018 were possible only because in 2017 the General  
25 Assembly leaders delayed implementation of remedial maps

1 through providing what a state court in 2019 determined were  
2 likely misrepresentations and falsities to the *Covington* court.

3 Plaintiffs contend that this action, as well as the  
4 revelation that their redistricting expert, Dr. Thomas  
5 Hofeller, secretly used racial data in constructing the  
6 proposed remedial districts, is relevant both to credibility  
7 determinations and to inferences that this Court can make about  
8 race. This delay of the remedial maps for the racial  
9 gerrymander of the General Assembly preserved the Republican  
10 party's supermajority and therefore permitted it to pass --  
11 place a constitutional amendment on the ballot. Under the  
12 North Carolina Constitution, that act required a three-fifths  
13 majority.

14 Second, the supermajority enabled the General Assembly to  
15 rush through a complex proposal, consideration, passage, and  
16 veto override of SB824 all in the waning days of the lame-duck  
17 session after the ill-gotten supermajority was lost in the 2018  
18 election under new court-imposed districts, but before the new  
19 legislature duly elected, without a veto-proof majority, was  
20 seated.

21 This is key to understanding the departures from normal  
22 procedural sequence that can be considered in this case. The  
23 legislature's choice to act during the final month of its  
24 supermajority, just as in *McCrory*, strongly suggested an  
25 attempt to avoid in-depth scrutiny.

1        Instead of waiting for a duly-elected legislature to be  
2 seated, the General Assembly engaged in a procedure that  
3 reflected what declarant Tomas Lopez, executive director of  
4 Democracy North Carolina, has submitted testimony before the  
5 Court was a rushed and opaque process which reflected a  
6 legislative body that lacked the representative legitimacy and  
7 perspective to address this critical issue.

8        Just a few key points on this, Your Honor. SB824 was filed  
9 almost exactly one year ago on the first Tuesday following  
10 Thanksgiving and was passed the following Thursday.  
11 Legislators, both longstanding and new members of the House and  
12 Senate, have provided compelling testimony to this Court that  
13 this was not a thoughtful or considered process and that it had  
14 significant irregularities.

15        We have provided testimony from Senator Van Duyn,  
16 Representative Reives, Representative Michaux, Senator  
17 McKissick, Representative Morey; and the Court also has before  
18 it testimony from Senator Harrison, Representative Woodard, and  
19 Senator Clark. The deposition of Senator Joel Ford and the  
20 declaration of Reverend T. Anthony Spearman and Tomas Lopez,  
21 executive director of Democracy North Carolina, reveal the  
22 same.

23        The process here was characterized by a lack of public  
24 debate and mixed signals and deception on public comment, which  
25 restricted the ability for critics to voice opinions. In the



1 process to rush to get it done while the General Assembly still  
2 had its supermajority, the legislature did not bring in  
3 experts. They rush a third reading to stifle imminent  
4 amendments that were prepared by the minority party.

5 And I'll just make -- note one more point here. A  
6 legislature need not break its own rules to engage in unusual  
7 procedures. The legislative history -- and I am coming to the  
8 close of the *Arlington Heights* factors, Your Honor. The  
9 legislative history of SB824 shows that it was developed and  
10 promoted by the same North Carolina General Assembly leadership  
11 caucus -- virtually the same General Assembly leadership caucus  
12 that enacted HB589.

13 As Table 1 here shows, a majority of those Republicans  
14 voting on the 2018 bill were the same as those who voted to  
15 enact HB589 under the 2013 post-*Shelby* bill. Of course, this  
16 is -- it is not our burden to show that it is the exact same  
17 decision-makers, but this does have a bearing in understanding  
18 the continuous lying between the enactments that were taking  
19 place all in a very short period of time.

20 That leadership caucus carried forward the knowledge of the  
21 data on the absence of voter impersonation fraud as found in  
22 *McCrory*, the knowledge of the race-based possession of  
23 disparities, the knowledge of the *McCrory* holding and its  
24 findings, and the knowledge of the payoff of vote denial or  
25 abridgement by race in the highly racially polarized voting

1 context of North Carolina.

2       Indeed, the General Assembly in 2013, which enacted one of  
3 the largest restrictions of the franchise in modern  
4 North Carolina history after, quote, receiving data indicating  
5 that African Americans would be the voters most significantly  
6 affected, that race data was still in hand when the  
7 North Carolina General Assembly took steps to enact SB824. It  
8 was exhaustively detailed in the *McCrory* decision and widely  
9 published.

10       And while the State may suggest that it's relevant to the  
11 Court's analysis that the General Assembly did not request data  
12 based on race in this enactment, this point misses the import  
13 of the *McCrory* court; that is, the decision did not argue that  
14 the request of data itself was suspect but, rather, that what  
15 the legislature did once it obtained that data was the indicia  
16 of intent. The fact that here the legislature did not publicly  
17 request new racial data after having the previous data in hand  
18 in an effort to seek to address the impact by race is confusing  
19 at the least and ultimately, we believe, is suspect.

20       Here again, as our experts have found, the provisions  
21 ultimately adopted by the North Carolina General Assembly under  
22 SB824 reveal an effort to create the appearance of addressing  
23 factors identified by the Court of Appeals as indicia of racial  
24 intent but the practical preservation and enhancement of the  
25 core elements and discriminatory impact of 589 as amended by

1 836.

2 As my colleague, John Ulin, will discuss, the new  
3 inclusion, if preapproved, of certain student and employer IDs,  
4 the new County Board of Elections-issued IDs, and the slight  
5 changes to the reasonable impediment declaration process  
6 focused on by Defendants do not significantly change the impact  
7 of SB824 or undermine the overall racial intent and impact with  
8 the law.

9 The acceptance of some apparently ameliorative amendments  
10 offered by a minority party is not dispositive in an intent  
11 finding. For example, this was also the case in *McCrory*. And  
12 here it does not tell the whole story. In the hurried  
13 consideration of SB824, the North Carolina General Assembly  
14 rejected significant efforts to ameliorate the racial intent of  
15 the bill. They either voted them down, tabled or otherwise  
16 rejected them.

17 I'll bring the Court's attention to a few. They rejected  
18 high school student ID inclusion in House Amendment 3. They  
19 rejected federally issued IDs in Senate Amendment 9. They  
20 rejected -- and this is critical for the Plaintiffs' case --  
21 federal and state public assistance IDs, an indicia of intent  
22 that the *McCrory* court found to be highly suspect. They  
23 rejected an amendment that proposed a cure for provisional  
24 ballots at polling places by receiving the signature of two  
25 witnesses who could attest to the voter's identity, which was

1 initially passed in committee but was subsequently removed; and  
2 in an earlier version of SB824, the State Board of Elections  
3 would have been required to coordinate with local media and  
4 provide -- disseminate information in Spanish and other  
5 languages under the law. That was ultimately removed.

6 Finally, two key points about what the legislature did not  
7 do. They rejected the minority party's commonsense request to  
8 accept an amendment to delay the rollout period of a new photo  
9 voter ID requirement in North Carolina to beyond the immediate  
10 pressing presidential election. So this amendment would have  
11 allowed for a soft rollout period during the 2020 election and  
12 delay the full implementation until 2021 of the law.

13 And the legislature rejected an amendment to restore the  
14 last Saturday of early voting, a day that the legislature had  
15 eliminated in another bill passed in the same session, SB325.

16 **THE COURT:** Let me ask this question: If they had  
17 included the public assistance IDs --

18 **MS. SWAIN:** Yes, Your Honor.

19 **THE COURT:** -- would we be here?

20 **MS. SWAIN:** I would rely on our expert's testimony to  
21 this point, Your Honor, and I can direct you to his deposition  
22 in this case. This is Dr. Allan Lichtman.

23 What Dr. Lichtman shows is that the public assistance ID  
24 rejection has a significant impact on the overall difference in  
25 racial disparities, but it does not -- but the addition of

1 public assistance IDs alone would not dramatically change the  
2 racial impact of this law given the other choices that the  
3 General Assembly took. It is one important indicia of the  
4 decision-making that this General Assembly took, but it's not  
5 the only one, and it must be considered within the context of  
6 the "totality of the circumstances" analysis both under the  
7 intent standard and under an intensely localized view of the  
8 electoral system under the results standard.

9 And I will -- I am close to concluding my remarks here and  
10 I think that this may -- this may also illuminate another  
11 aspect of the choice that was not just a continuation of what  
12 the General Assembly did in HB589 but was, in fact, a  
13 restriction that the 2018 General Assembly chose to make in  
14 2018.

15 As Your Honor can see, SB824, in addition to embracing the  
16 previous exclusion of both public assistance IDs and federal  
17 government IDs, it changed the new expiration date limit from  
18 one year to four years. This expiration date limit goes to DMV  
19 IDs, passports, out-of-state IDs, and tribal IDs; and the only  
20 exception to this rule is that voters who are 65 or older can  
21 use expired IDs so long as the ID was valid on the voter's 65th  
22 birthday.

23 My counsel is identifying for me that there is a mistake in  
24 how I've just phrased this and I want to make sure I've gotten  
25 it right for you, Your Honor.

1       The limit was changed from four years to one year. That is  
2 an important distinction.

3       The General Assembly also excluded learner's permits and  
4 provisional licenses in this law, which were previously  
5 accepted under -- at 589.

6               **THE COURT:** Why is that relevant?

7               **MS. SWAIN:** Your Honor, what the data shows -- and  
8 this is detailed, again, in Dr. Lichtman's report -- is that  
9 learner's permits and provisional licenses are  
10 disproportionately possessed by African Americans in the state  
11 of North Carolina.

12       And I want to note one more thing as to the expiration date  
13 65-year-old expansion. So this was -- this is an exception for  
14 65 and older, which on its face appears to be ameliorative; but  
15 I want to note for Your Honor that while 24.2 percent of the  
16 white voting age population in North Carolina is 65 years or  
17 older, only 16.1 percent of the black population in  
18 North Carolina is 65 or older and, in addition, only 5 percent  
19 of Latinos in North Carolina are 65 or older. So as the --  
20 what the evidence shows again is that this exception  
21 disproportionately benefits white voters, as opposed to African  
22 American and Latino voters.

23       Finally, the legislative record demonstrates a continuation  
24 of the clearly pretextual antifraud rationale already rejected  
25 in *McCrory*, which my colleague is going to cover in more

1 detail. Numerous legislators asserted that the law was needed  
2 to address in-person voter fraud, but no evidence of in-person  
3 voter fraud was presented during the consideration of either  
4 the constitutional amendment or SB824 that was of significance.  
5 Bill proponents allege that a photo voter ID law was needed to  
6 restore voter confidence in the state election system, but  
7 again provided no evidence that confidence was lacking or that  
8 photo voter ID would increase public confidence.

9 **THE COURT:** Doesn't *Crawford* say that's okay?

10 **MS. SWAIN:** Your Honor, *Crawford* -- Plaintiffs do not  
11 dispute that it could be a legitimate interest for the State  
12 under -- for the reasoning expressed in *Crawford* to express an  
13 interest in preventing voter fraud or in addressing election  
14 security issues, but that must be the actual interest of the  
15 State, and it must have -- there must be evidence to support  
16 that that is the interest. In this case, the overwhelming  
17 evidence shows that that assertion once again was pretextual.

18 In closing, Your Honor, the degree of disproportionate  
19 impact of official action, which is the final factor of an  
20 *Arlington Heights* analysis, here I want to make two important  
21 points before allowing my colleague to address in detail the  
22 disparate impact of this law.

23 The General Assembly knew that its decision would bear more  
24 heavily on African American voters than white voters and they  
25 knew it because they already had in their possession previous

1 studies that demonstrated dramatic disparities. They had a  
2 January 2013 SBOE matching study. They had an April 2013 SBOE  
3 matching study and this shows voters who are unmatched --  
4 registered voters in North Carolina who do not possess a DMV  
5 ID. And my colleague is going to speak more about some of the  
6 distinctions there.

7 And, finally, they had 20 -- they had the exhaustive record  
8 of *McCrory*, which detailed in more close examination the --  
9 what the difference -- differences would be in possession rates  
10 in the state.

11 My colleague, John Ulin, will lay out the numerous  
12 consistent studies showing racial disparities of SB824 in more  
13 detail in his presentation; but in summary, Your Honor,  
14 Plaintiffs contend that SB824 must be enjoined as to its racial  
15 intent under Section 2 in the Constitution, and I look forward  
16 and am happy to answer any questions from the Court.

17 **THE COURT:** Thank you.

18 **MS. SWAIN:** Thank you.

19 **THE COURT:** Let me ask one question of you before you  
20 sit down. Now, there were other provisions other than the  
21 photo ID provision that you argue make this discriminatory.

22 **MS. SWAIN:** Yes, Your Honor.

23 **THE COURT:** You haven't mentioned them today and you  
24 barely mentioned them in your brief.

25 **MS. SWAIN:** Yes, Your Honor.



1           **THE COURT:** What is the Court to do with that? And  
2 those two provisions are the increased number of poll workers  
3 and the increased number of people who can challenge ballots.

4           **MS. SWAIN:** Yes, Your Honor. I will address this as  
5 to the intent claim and then I will allow my colleague to  
6 address it as to the results claim.

7           As to the intent claim, we believe that both of those  
8 decisions have a bearing on the Court's finding as to racially  
9 discriminatory intent. What we've provided in the record is  
10 specific instance -- is specific evidence demonstrating that  
11 the increase in poll observers and the increase -- the  
12 expansion in the ability for voters to challenge based on photo  
13 voter ID will have an intimidation effect on voters.

14           Of course, we understand that that argument could be -- we  
15 have not briefed it thoroughly for the Court as to the  
16 March 2020 primary, which is a -- which is going to be a less  
17 high turnout election; but it's our contention that in the  
18 ultimate November election, a general election where you are  
19 going to see -- where we -- the prediction is that we're going  
20 to see some of the largest turnout in this state, that that  
21 provision in -- those new provisions and interaction with the  
22 photo voter ID requirement will have a cumulative effect as to  
23 the racial discriminatory impact because it adds the  
24 possibility and potential for voter intimidation.

25           **THE COURT:** All right. Thank you.

1           **MS. SWAIN:** Thank you, Your Honor.

2           **THE COURT:** Yes, sir.

3           **MR. ULIN:** Thank you, Your Honor.

4           I'm going to turn now to the Section 2 discriminatory  
5 results claim. The Supreme Court and the Fourth Circuit have  
6 held that a claim under Section 2 of the Voting Rights Act can  
7 be established by proof of discriminatory results alone. The  
8 key question is to whether the challenged voting practice  
9 interacts with social and historical conditions in the  
10 jurisdiction in a way that denies or abridges minority voting  
11 rights. The statute explains that Section 2 is violated when a  
12 challenged practice results in members of a protected class  
13 having less opportunity than white voters to participate in a  
14 political process and elect candidates of their choice.

15          In the vote denial context, like this case, the Fourth  
16 Circuit has distilled a two-part test for Section 2 results  
17 claims. The first element is that the Court should examine  
18 whether the challenged law imposes a discriminatory burden on a  
19 protected class and then, second, the Court inquires into  
20 whether that discriminatory burden is in part caused or caused  
21 by or linked with social or historical conditions that have or  
22 currently produce discrimination against members of that  
23 protected class. And that's in the *League of Women Voters*  
24 *versus North Carolina* case from the Fourth Circuit in 2014.  
25 Plaintiffs have shown -- presented evidence to this Court

1 showing that they meet both elements of relief from the voters'  
2 standard.

3 In support of the first element, the burden on a protected  
4 case, the Plaintiffs have provided this Court with multiple  
5 sources of evidence that North Carolina's black and Latino  
6 voters disproportionately lack the IDs needed to vote under  
7 SB824. The law therefore imposes a discriminatory burden on  
8 their ability to vote and threatens to disenfranchise many  
9 voters entirely, and that discriminatory burden satisfies both  
10 the first element of our claim under the Section 2 results  
11 standard and the fifth factor of the *Arlington Heights* analysis  
12 that supports our discriminatory intent claim under both  
13 Section 2 of the Voting Rights Act and the Fourteenth and  
14 Fifteenth Amendments.

15 The point was clear to the Fourth Circuit when it decided  
16 the *McCrory* case three years ago. The Court of Appeals noted  
17 that the record below in that case had established that black  
18 voters disproportionately lacked the types of ID required to  
19 vote under the former voter ID law as the District Court  
20 actually had made that finding. The discriminatory impact was  
21 sufficient in *McCrory* to support Plaintiffs' successful  
22 discriminatory intent claim and the evidence before the Court  
23 in support of this motion demonstrates there's no reason to  
24 believe those circumstances have changed.

25 Professor Matthew Barreto of UCLA conducted a survey of

1 eligible North Carolina voters to determine the effects of  
2 SB824 on the current voter population. Professor Barreto's  
3 survey asked voters whether they possessed any of the forms of  
4 qualifying ID listed in SB824. It was not limited to the  
5 DMV-issued forms of ID.

6 The survey revealed that 12.4 percent of black voters lack  
7 a qualifying ID with a photograph that still resembles them, as  
8 SB824 requires, and 16.7 percent of Latinos lack such  
9 identification. When compared with white voters, black voters  
10 were therefore more than twice as likely to lack a qualifying  
11 ID and Latinos were more than 2.7 times as likely as whites to  
12 lack qualifying ID.

13 Professor Barreto's analysis is consistent with statistics  
14 provided by Professor Allan Lichtman of American University.  
15 Professor Lichtman presented statistics from the Survey of the  
16 Performance of American Elections, SPAE, which is a respected  
17 independent survey that's used by political scientists.

18 SPAE recorded data on the possession of unexpired driver's  
19 licenses, passports, and military and tribal IDs, as well  
20 in-state student IDs and in-state state or local government IDs  
21 for voters in the state of North Carolina; and the SPAE data  
22 revealed that whereas only 4.1 percent of white voters did not  
23 possess any one of the listed IDs, fully 15.1 percent of black  
24 voters lacked any one of those forms of ID. And that evidence  
25 obviously confirms the disparities found in *McCrory* and also

1 suggested by Professor Barreto.

2 Professor Michael Herron, Dartmouth College, has presented  
3 this Court with similar evidence based on an analysis of the  
4 State's own data, which is similar to the data that was before  
5 the court in *McCrory*.

6 In September, the State produced its list of registered  
7 voters who do not possess a valid driver's license or  
8 state-issued photo ID card that can be used to satisfy the  
9 requirements of SB824. Professor Herron analyzed the  
10 composition of the no-match list, as it's called, by race and  
11 determined that, while 4.9 percent of non-Hispanic white  
12 registered voters do not possess one of those two most common  
13 forms of ID used to satisfy SB824, 10.6 percent of black  
14 registered voters and 11.1 percent of Hispanic registered  
15 voters do not possess one of those forms of ID.

16 The State's data therefore confirms the findings elsewhere  
17 that black and Latino voters in North Carolina are more than  
18 twice as likely to lack qualifying ID under SB824 than white  
19 voters.

20 Now, Defendants argue that this no-match list doesn't  
21 present an accurate picture because it's intended to be  
22 overinclusive and it's used to inform voters that they may need  
23 to take some action to assure that they have an ID that's  
24 necessary to vote under SB824.

25 Even if that's true, Professor Herron's analysis of the

1 no-match list yields results consistent with the analyses of  
2 other data in the record submitted by Professors Lichtman and  
3 Barreto, and the conclusions of the Fourth Circuit in *McCrory*,  
4 which in turn were based on expert reports from Professor  
5 Charles Stewart of MIT and Professor Kevin Quinn of UC  
6 Berkeley.

7 It's also worth noting that SBOE Executive Director Karen  
8 Brinson Bell told this Court in her declaration that after the  
9 State sent notices to more than 617,000 voters on their  
10 no-match list, only 167 people wrote to indicate that they  
11 either had an ID or that the letter had gone to somebody who  
12 was deceased and therefore didn't get to receive it.

13 The State points to three factors that it contends  
14 ameliorates these disparities in ID possession, but none of  
15 them eliminates the disparate impact that the Fourth Circuit  
16 recognized.

17 First, Defendants point to the list of various types of  
18 identification that can be used to satisfy SB824, which is more  
19 extensive than just DMV-issued IDs, but that argument doesn't  
20 get them anywhere.

21 Professor Barreto surveyed eligible voters about whether  
22 they possessed any of the forms of identification found -- and  
23 found that blacks and Latinos disproportionately lacked any  
24 form of qualifying ID. Professor Lichtman presented SPAE  
25 evidence that analyzed possession of a wide range of IDs not

1 limited to DMV-issued IDs and all of -- excuse me. All of the  
2 experts noted that the DMV-issued IDs are the most common forms  
3 of ID used to satisfy SB824.

4 The disparity in possession of driver's licenses and  
5 state-issued photo IDs was therefore sufficient in itself for  
6 the Fourth Circuit to conclude that the former voter ID law  
7 violated Section 2 and this collection of evidence is  
8 sufficient to allow this Court to reach the same conclusion.

9 Defendants also point to the recent approval of student IDs  
10 or additional student IDs as an example of the expanded range  
11 of IDs that voters can use under SB824. And while the State  
12 has recently approved 12 additional universities' IDs,  
13 Professor Barreto's survey asked respondents about whether they  
14 possessed student IDs; and he still found the significant  
15 disparities in qualifying ID ownership among white, black, and  
16 Latino voters that I reported earlier.

17 It's also worth noting that even after the approval of  
18 additional student IDs only 40 percent of eligible colleges and  
19 universities, roughly 50 out of 126, have their IDs approved  
20 for use under SB824 and only 12 of 57 community colleges have  
21 their IDs approved. And the numbers are far worse for eligible  
22 public employer IDs.

23 If North Carolina were actually serious about expanding the  
24 range of qualified IDs, it would have done what Virginia did  
25 and authorized the use of all student IDs and all public

1 employer IDs and private employer IDs and public -- excuse  
2 me -- and -- I'm sorry -- the public assistance IDs that are  
3 not eligible in North Carolina but are eligible to be used in  
4 Virginia.

5 But regardless, the evidence before the Court is that the  
6 inclusion of student IDs in SB824's potentially qualifying --  
7 list of potentially qualifying IDs has not relieved the  
8 discriminatory impact of the law on black and Latino voters.

9 Defendants next point to the fact that voters who lack ID  
10 can obtain free IDs from the Department of Motor Vehicles or  
11 from their local County Board of Elections. And while free IDs  
12 may be available, the Court should look at whether the free ID  
13 program is actually having any effect on the disparities in ID  
14 ownership.

15 Now, Ms. Brinson Bell tells us that in the first six months  
16 of the CBOE ID program, from April to October of 2019, only  
17 1,700 IDs have been issued. Even if they were all issued to  
18 black and Latino voters -- and no evidence suggests that --  
19 that would hardly make a dent in the disparities in ID  
20 ownership. So with three months left to go before the first  
21 election in which SB824 would apply, it's impossible to believe  
22 that free IDs will meaningfully affect the racially  
23 discriminatory impact of the new voter ID law.

24 Our experts explain why the free ID provision will not  
25 ameliorate those disparities. At the most basic level, if



1 voters know about SB824 -- and many do not -- they do not know  
2 how the law operates. Professor Barreto reports that voters he  
3 surveyed lack qualifying IDs over -- who lack qualifying IDs  
4 overwhelmingly and wrongly believe that they actually possess  
5 qualifying IDs. Of course, those people won't seek free IDs.

6 And a majority of people who -- of voters -- excuse me.  
7 The majority of all voters have never heard of the CBOE free  
8 voter IDs and the numbers were even higher for those who lack  
9 qualifying ID. Voters are obviously not seeking free IDs that  
10 they don't know exist; and even among voters who say they have  
11 heard of free North Carolina voter ID cards, a significant  
12 majority don't know that they're available at the County Board  
13 of Elections or wrongly believe that they can obtain them at  
14 the DMV or somewhere else.

15 And even when voters know that they can obtain free ID from  
16 the CBOE or the Department of Motor Vehicles, the very step of  
17 acquiring an ID that they don't need, except to comply with  
18 SB824, is an additional burden on voters who lack ID, who are  
19 disproportionately black and Latino. It's a burden that  
20 wrongly assumes that people plan for voting months in advance  
21 and it's one that communicates to voters who lack ID that the  
22 State is putting obstacles in the way of their ability to vote  
23 and does not want them to vote, which, as Ms. Swain argued  
24 earlier, is actually true in this instance.

25 For these reasons and others, Professors Burden and

1 Lichtman opine that voters without ID are not likely to use the  
2 free ID provisions in a way that reduces the racial disparities  
3 created by SB824 in terms of who the law prevents from voting,  
4 even to add. And even those who do obtain free IDs will still  
5 have had to jump through hoops just to exercise their  
6 fundamental right to vote.

7 Finally, the State suggests that SB824's reasonable  
8 impediment declaration will enable all voters to cast at least  
9 a provisional ballot even if they lack a qualifying ID, but  
10 this argument suffers from some of the same flaws as the one  
11 about free ID provisions.

12 First, Professor Barreto reports that a significant  
13 majority of voters he surveyed who do not have qualifying ID  
14 believe that voters who lack ID will not be permitted to vote  
15 under SB824. Among blacks and Latinos who lack qualifying ID,  
16 a majority would skip voting if they learned they did not have  
17 a qualifying ID, and roughly three-quarters of voters who lack  
18 qualifying ID were simply unaware of SB824's reasonable  
19 impediment provision. Obviously, voters who stay away from the  
20 polls because they lack qualifying ID will not avail themselves  
21 of the reasonable impediment option and that's a huge point.  
22 Professor Lichtman estimates in his rebuttal report that SB824  
23 will deter over 100,000 voters from coming to the polls, and  
24 those voters are disproportionately black and Latino.

25 Of course, completing the reasonable impediment declaration

1 is also an additional burden on voting in itself and one that  
2 falls disproportionately on blacks and Latinos, who more  
3 frequently lack qualifying ID. The result is a polling place  
4 with two lines: One for voters who possess qualifying ID,  
5 which is disproportionately white, and one for voters who lack  
6 qualifying ID, which is disproportionately black and Latino.

7 Moreover, the State's suggestion that the reasonable  
8 impediment declaration can be used by any voter to state any  
9 reason for not having a photo ID is simply not supported by the  
10 language of SB824 or the State's own educational materials.  
11 SB824 lists seven recognized reasonable impediments to being  
12 able to present a qualifying ID. The very existence of that  
13 list indicates that the catchall "other reasonable impediment"  
14 option cannot have been intended to allow voters to offer any  
15 excuse at all for not presenting an ID.

16 Section 1.2(h) of the law specifically allowed voters to  
17 state as a reasonable impediment that they were not aware of  
18 the photo ID requirement, but only in 2019 elections. So  
19 beginning in 2020, that specific impediment is no longer  
20 available -- I apologize -- nor is the statement telling  
21 election officials or voters that they can offer any excuse at  
22 all for not presenting an ID. On the contrary, the State is  
23 contacting voters without DMV-issued IDs to ensure they have  
24 qualifying IDs to present and did not indicate in training  
25 materials that Ms. Brinson Bell submitted to this Court that

1 any excuse goes.

2 Overall, SB824's reasonable impediment declaration is  
3 substantially similar to the one in HB589, which was before the  
4 court in *McCrory*. The court there found that it did not cure  
5 the disparate impact created by the disproportionate lack of  
6 qualifying IDs among black voters. That conclusion was  
7 doubtlessly formed by North Carolina's experience in the  
8 March 2016 primary election where black reasonable impediment  
9 votes were disproportionately likely to be discounted, as  
10 Democracy North Carolina noted in a report that's attached to  
11 the declaration of Tomas Lopez, which has been submitted to  
12 Your Honor. 34 percent of provisional votes that were thrown  
13 out in the 2016 primary were cast by black voters. Yet the  
14 population that cast any -- cast any ballot or participated in  
15 that election was only 19 percent black.

16 The Democracy North Carolina report noted slow and  
17 inconsistent application of the reasonable impediment  
18 declaration provision in the March 2016 primary, with minority  
19 voters more likely not to have their ballots counted. The  
20 standards for what qualified as a reasonable impediment were  
21 ambiguous and the law put too much discretion in poll workers  
22 and CBOE officials.

23 And while the State argues that SB824 cures that issue by  
24 making falsity the only ground for rejecting a stated  
25 impediment, even the question of falsity leaves ambiguity. For

1 example, what if a voter has access to some transportation but  
2 doesn't believe that she can use it to get to the CBOE to  
3 obtain an ID? Can she say she lacks transportation? That's  
4 actually the situation of voter Jeanette Dumas, who described  
5 it in the declaration that she submitted in support of this  
6 motion.

7 In sum, the evidence before this Court shows that  
8 Plaintiffs are likely to succeed in proving that SB824 has a  
9 discriminatory impact on black and Latino voters' ability to  
10 exercise their voting rights and that that impact is not cured  
11 or meaningfully affected by the so-called ameliorative  
12 provisions of the new voter law.

13 Now, having shown that discriminatory impact, the second  
14 element of the (unintelligible).

15 **COURT REPORTER:** I'm sorry. You're going to have to  
16 say that again.

17 **MR. ULIN:** Absolutely. My apologies. It's a  
18 professional hazard and tendency that I have to speed up, so I  
19 will try to slow it down.

20 Having shown discriminatory impact, the second element of  
21 the Section 2 claim under *League of Women Voters* is  
22 demonstrating that it results from the interaction of that  
23 law -- of the challenged law with historical or social  
24 conditions in the jurisdiction that cause discrimination, and a  
25 few initial points on this second element.

1 First, the Fourth Circuit indicates that it should be  
2 analyzed using the so-called Senate Factors which were outlined  
3 in the Senate report that accompanied the amended Section 2 in  
4 1982 and have been endorsed by the Supreme Court in the *Gingles*  
5 decision as the proper way to analyze a Section 2 claim.

6 Second, the "Senate Factors" analysis is intensely  
7 localized, as the Fourth Circuit acknowledged in the *League of*  
8 *Women Voters* case. Similar laws may be written or implemented  
9 differently in different jurisdictions, and the history and  
10 social conditions of each jurisdiction can result in similar  
11 laws having different effects. What's important is a searching  
12 and practical inquiry into the experience of voters and  
13 election workers in the specific jurisdiction.

14 And, finally, the *League of Women Voters* standard focuses  
15 on the interaction of a law with social and historical  
16 conditions in a jurisdiction, but it's not solely a focus on  
17 historical conditions. Rather, the current local conditions  
18 that cause discrimination are equally critical to the analysis.

19 Professor Barry Burden of the University of Wisconsin  
20 synthesized most of the evidence that supports Plaintiffs'  
21 analysis of the Senate Factors in support of their Section 2  
22 claim. Professor Burden applied the Senate Factors through the  
23 lens of what he calls the calculus of voting. Put simply,  
24 Professor Burden informed the Court that voter participation  
25 depends on a cost-benefit analysis. Costs to include the

1 effort to become educated about an election and the candidates,  
2 as well administrative and other barriers to registering and  
3 casting a ballot. The benefits include seeing preferred  
4 candidates win and the perception that government is responsive  
5 to one's interests.

6 Professor Burden discussed how increasing the  
7 administrative costs to voting even marginally, including by  
8 changing polling hours or by not providing some sample ballots,  
9 has negative effects on minority voting. He further told this  
10 Court that SB824's voter ID requirement imposes just the sort  
11 of additional administrative costs that will predictably deter  
12 minority voting in North Carolina.

13 Among other factors, voters must present ID which minority  
14 voters disproportionately do not have. Those who do not have ID  
15 must take the time and make the effort to obtain them, often  
16 making multiple trips to government offices; and voters who  
17 appear at the polls without an ID may only vote provisional and  
18 must fill out an additional form in order to do so. These  
19 costs all fall disproportionately on North Carolina's voters of  
20 color who, as Dr. Burden demonstrates, are already susceptible  
21 to being disproportionately burdened by additional  
22 administrative purpose.

23 Turning to the Senate Factors, we begin with the first  
24 factor: The history of official voting-related discrimination.  
25 The history of post-Reconstruction disenfranchisement of black

1 voters in North Carolina, as detailed in the report of  
2 Professor James Leloudis of the University of North Carolina  
3 and digested by Professor Barry Burden at pages 8 to 10 of his  
4 report, that history contributed to the underrepresentation of  
5 minority voters and their interests in North Carolina  
6 government that has only improved since the enactment of the  
7 federal Voting Rights Act.

8 Without reviewing the entire history, there are a few  
9 points worth noting. Some of the well-known disenfranchising  
10 devices used in North Carolina included poll taxes, literacy  
11 tests, and grandfather clauses, all of which the Voting Rights  
12 Act was specifically intended to eliminate, but SB824 has  
13 elements of each.

14 It operates like a poll tax because voters without ID must  
15 invest time and money to travel to government offices to obtain  
16 IDs that they don't need, except under -- to vote under SB824.

17 It operates like a literacy test because it requires voters  
18 without ID to navigate additional legal requirements and fill  
19 out forms, including the reasonable impediment declaration that  
20 many find difficult to understand.

21 And, finally, it operates like a grandfather clause by  
22 allowing voters over age 65, as well as military voters, who  
23 are disproportionately likely to be white, to use expired IDs  
24 more broadly than voters under age 65, who are  
25 disproportionately likely to be black or Latino.



1 In this way, the law provides benefits to white voters that  
2 are denied to black and Latino voters.

3 It's also worth noting that while it's not -- while it's  
4 not enforced, North Carolina's literacy test is still enshrined  
5 in the state Constitution. More importantly, the General  
6 Assembly considered a bill to remove it in 2013, but the bill  
7 was defeated by the same Assembly that passed the former voter  
8 ID law in a decision that sent a clear message to black voters  
9 about whether the State's legislature represented their  
10 interests.

11 Factor 2: Racially polarized voting. Racially polarized  
12 voting is a well-established feature of the political map in  
13 North Carolina. As the State's own expert in *McCrory* noted,  
14 race is the single most reliable factor in determining how a  
15 North Carolina voter will vote. The Supreme Court recognized  
16 that the tendency of black and white North Carolina voters to  
17 support different candidates in its 1986 decision in *Thornburg*  
18 *versus Gingles* and the Fourth Circuit found that racially  
19 polarized voting was still prevalent 30 years later when it  
20 handed down its decision in *McCrory*. The court emphasized that  
21 racially polarized voting was what created the incentive for  
22 the Republican legislature to enact voting legislation that  
23 diminishes black and Latino voting strength.

24 Defendants do not dispute the presence of racially  
25 polarized voting in North Carolina, which is amply supported by

1 the expert reports of Professors Lichtman, Burden, and Barreto.  
2 Looking to recent statewide races, Plaintiffs' experts note  
3 that in each of the presidential elections in -- general  
4 elections in North Carolina from 2000 to 2016 the gap between  
5 black and white support for Democratic nominees was roughly  
6 60 percent or more. That far exceeds the disparities for  
7 demographic groups based on income, sex or education.

8 Racial polarization was also present in midterm elections  
9 in this decade and thus extends beyond the presidential races.  
10 And Professor Burden reported that it's visible in contested  
11 presidential primaries where it can't be explained as a  
12 partisan divide. For example, in 2008, President Obama was the  
13 clear choice of black Democrats, whereas white Democrats  
14 preferred Hillary Clinton; and in 2016, Secretary Clinton was  
15 the choice of black Democrats in North Carolina, while Bernie  
16 Sanders was the choice of white Democrats.

17 Finally, Professors Barreto and Lichtman provide evidence  
18 that racially polarized voting patterns have also emerged  
19 between white and Latino voters in this state as the latter  
20 have become more active in politics over the last decade.

21 Factor 3: Voting practices that enhance the opportunity  
22 for discrimination. As the Fourth Circuit noted in the *League*  
23 *of Women Voters* decision, the sorts of vote-denying practices  
24 challenged in that case, and also here, were largely prevented  
25 by the preclearance requirements of the Voting Rights Act under

1 the old Section 4 and Section 5.

2 But North Carolina moved quickly after the Supreme Court  
3 gutted the preclearance regime in the *Shelby County* decision in  
4 2013 and passed new restrictions. SB589 adopted a photo ID  
5 requirement, eliminated same-day registration, reduced the  
6 early voting period, and ended out-of-precinct ballots. In  
7 *McCrory*, the Fourth Circuit held that SB589 and all of these  
8 provisions were motivated by race discrimination, that is, by a  
9 desire to preserve the legislative majority by imposing burdens  
10 on minority voters who tend to vote for the other party.

11 The General Assembly drew up racially gerrymandered maps  
12 for state and federal legislative districts in this decade,  
13 which were later thrown out as unconstitutional in two separate  
14 lawsuits. The maps were intended to entrench majority power in  
15 the legislature by reducing minority voting strength, and they  
16 had the result of rendering the Assembly unrepresentative of  
17 the interests of black and Latino voters.

18 More recently, the court in *Common Cause versus Lewis* found  
19 in 2019 that the Assembly had lied to other courts about its  
20 use of racial statistics to ensure that the legislative maps  
21 created districts favorable to Republican candidates, and the  
22 purpose of the lying was to preserve the advantages of the  
23 racially gerrymandered maps for as long as possible at the  
24 expense of representing the interests of black and Latino  
25 voters.

1       In addition, although the State has a rapidly growing  
2 Latino population that now comprises 11 percent of the State's  
3 entire population and approaches 20 percent in some counties,  
4 there's no requirement that ballots or election materials be  
5 made available in Spanish, and they frequently are not  
6 available even in the counties with the highest Latino  
7 populations.

8       In SB824 itself, Democracy North Carolina ED Tomas Lopez  
9 notes that the original version of the law required educational  
10 materials to be created in Spanish for the benefit of  
11 North Carolina's Latino voters, but that language was  
12 eliminated from the final version of the law, and SBOE and  
13 county officials are therefore not required to provide Spanish  
14 language materials, which only increases the discriminatory  
15 burden of the law on Latino voters.

16       Factor 5: Effects of discrimination that hinder the  
17 ability of minorities to participate in the political process.  
18 So the Defendants do not and cannot contest the effects of  
19 discrimination on North Carolina blacks and Latinos in critical  
20 outcomes. Specifically, blacks and Latinos in this state  
21 generally earn lower incomes and suffer higher rates of  
22 unemployment and poverty than white residents. Black and  
23 Latino students show lower rights of educational achievement,  
24 and they ultimately reach lower rates of educational  
25 attainment, which Professor Burden notes is the single biggest

1 factor in determining whether an individual person votes.

2 Blacks and Latinos are also subject to worse health  
3 outcomes and unequal treatment in the criminal justice system.  
4 They suffer higher rates of incarceration, which can affect  
5 their ability to vote. Felon disenfranchisement effects three  
6 times more blacks than whites; and minorities are subjected to  
7 more traffic stops in North Carolina, which can result in a  
8 loss of a driver's license, the most common form of ID used to  
9 satisfy SB824. Overall, Professor Burden notes that negative  
10 experiences with the criminal justice system decrease  
11 participation in the political process, including voter  
12 turnout.

13 Together these discriminatory outcomes combine to increase  
14 the costs of voting for black and Latino voters who have fewer  
15 resources than white voters to navigate the requirements of  
16 SB824 and other voting laws and diminish the perceived benefits  
17 of voting because government is not delivering equally for  
18 black and Latino voters in areas such as education, healthcare,  
19 and criminal justice.

20 Factor 7: The extent of minority election to public  
21 office. So Professor Burden informs this Court that only one  
22 black candidate has ever been elected to statewide office in  
23 North Carolina and the state has never elected a black United  
24 States senator. Following Reconstruction, the General Assembly  
25 had no black members until 1968 and North Carolina sent no

1 blacks to Congress until 1992. And while blacks now occupy  
2 Assembly seats in rough proportion to their numbers in the  
3 overall population, Professor Burden informs the Court that  
4 that that phenomenon is vulnerable.

5 Black voter turnout increases have tracked increases in  
6 representation among elected officials, but that has only  
7 happened in the aftermath of the passage of the Voting Rights  
8 Act. And that trend suggests that laws like SB824, which deter  
9 minority participation, will result in less success for  
10 minority candidates, which will in turn decrease the perceived  
11 benefits of voting for black voters and ultimately their  
12 propensity to vote.

13 The record is more stark for Latinos. North Carolina has  
14 never elected a Latino to statewide office, to Congress, to the  
15 United States Senate or to the General Assembly. Well, Tom  
16 Apodaca actually sits in the Assembly, but he's indicated that  
17 he doesn't consider himself Hispanic. And even if he is, that  
18 would raise the total number of Hispanic -- Latino  
19 representatives ever elected to one.

20 The absence of Latino (unintelligible).

21 **COURT REPORTER:** I'm sorry. Can you repeat that  
22 again?

23 **MR. ULIN:** Absolutely.

24 The absence of Latino electoral success tends to reduce the  
25 perceived benefits of voting for Latinos and as a result to

1 make Latinos more vulnerable to be deterred from voting by a  
2 voter suppression law like SB824.

3 The Senate report also includes two unenumerated factors,  
4 both of which support Plaintiffs' Section 2 claim here. The  
5 first is a lack of responsiveness by elected officials. The  
6 Court's analysis of Senate Factor 5, the effects of  
7 discrimination in ways that hinder minority political  
8 participation, is highly relevant here.

9 Specifically, disparate educational outcomes result from  
10 disparities in the quality of public schools. Disparate  
11 healthcare outcomes result from the quality of public hospitals  
12 and medical services for blacks and Latinos, and disparate  
13 treatment by the criminal justice system is directly related to  
14 whether government is responsive to minority voters. In each  
15 of these areas, the government's lack of responsiveness to  
16 minority voters in education, healthcare, and criminal justice  
17 affects both the incentives for blacks and Latinos to  
18 participate in the political process and the resources they  
19 will have to be able to participate successfully.

20 Recent efforts to roll back legal provisions and funding to  
21 alleviate racial and ethnic disparities that were identified by  
22 both Professors Burden and Leloudis also reflect a state  
23 government that is not responsive to minority interests. That  
24 communicates a clear message to minority voters about the  
25 benefits of participating in the political process.

1 Professor Burden focused particularly on the repeal of the  
2 Racial Justice Act, which was intended to ameliorate  
3 discriminatory conditions in the criminal justice system.  
4 Discriminatory voting-related enactments like HB589 and the  
5 racial gerrymanders of both state and federal electoral  
6 districts further communicate the message that government is  
7 not responsive to minority interests.

8 And Professor Burden has provided evidence of specific  
9 nonresponsiveness to Latino interests. Here again, he noted  
10 the failure to provide Spanish language voting materials in  
11 ballots even in the most heavily Latino North Carolina counties  
12 and the General Assembly's decision to remove the requirement  
13 that educational materials be provided in Spanish from SB824.  
14 He also discussed the social science research that shows that  
15 North Carolina County Boards of Elections respond more quickly  
16 to e-mail from white-named fictional voters than to e-mails  
17 from Latino-named fictional voters.

18 Finally, and the second unenumerated factor, the stated  
19 rationales for SB824 are plainly tenuous. The principal  
20 rationale offered by sponsors for the voter ID law is the  
21 prevention of fraud, but voter ID does not address all forms of  
22 election fraud. It only reaches voter impersonation, that is,  
23 a person trying to vote as someone else.

24 As Plaintiffs' expert Lorraine Minnite indicated in her  
25 report, she's studied the issue and found that voter



1 impersonation is not a problem in North Carolina and never has  
2 been. The State's own audit of the 2016 election confirmed  
3 that voter impersonation was not an issue in that year and  
4 that's hardly surprising given that it's a felony with a  
5 significant potential jail term and the benefit of the crime is  
6 to increase a candidate's vote total by one.

7 Even in the face of this evidence, the State continues to  
8 argue that fraud prevention is a true rationale for SB824.  
9 They point to the prosecution of individuals accused of double  
10 voting in North Carolina and other states, and to the absentee  
11 ballot harvesting scandal that affected last year's  
12 congressional elections.

13 But double voting is not addressed by voter ID laws and  
14 SB824 would not address the absentee ballot harvesting in which  
15 voters allow other people to complete their ballots in the  
16 mistaken belief that they're filling out ballots consistently  
17 with the voter's wishes. Voters who allow their ballots to be  
18 harvested would presumably allow the harvesters or provide the  
19 harvesters with whatever is needed to assure that the ballot  
20 can be submitted and counted.

21 Now, although SB824 sponsors sold it as a fraud prevention  
22 measure, Defendants now argue that the law promotes voter  
23 confidence. But Professor Burden indicates that academic  
24 research shows voter ID laws have no influence on voter  
25 confidence in the electoral system. Actually, Tomas Lopez and

1 Kate Fellman report in their declarations before this Court  
2 that voter ID actually decreases confidence in the electoral  
3 system, especially among black and Latino voters who see the  
4 General Assembly acting deliberately to deter or prevent them  
5 from voting and to impose greater burdens on their exercise of  
6 their fundamental rights. Finally, Professor Burden testified  
7 that false claims of voter fraud, like the ones that  
8 accompanied SB824, are damaging to voter confidence, especially  
9 when made by elected officials.

10 For all these reasons, Defendants' voter confidence  
11 rationale is plainly pretextual and unsupported by the evidence  
12 before this Court.

13 Defendants also claim that SB824's purpose was to fulfill  
14 the voter mandate in the voter ID constitutional amendment.  
15 But voters surely did not mandate a discriminatory voter ID law  
16 that violates the Voting Rights Act as SB824 does. They did  
17 not mandate any particular law and certainly did not mandate  
18 SB824 and all of its provisions. Ultimately, the voters can be  
19 presumed not to have mandated an illegal enactment. Because  
20 SB824 violates Section 2, Defendants cannot credibly argue that  
21 this law is necessary to fulfill the mandate of the voter ID  
22 constitutional amendment.

23 SB824 is also tenuous because it's burdensome  
24 unnecessarily. The law imposes unnecessary limits on the types  
25 of IDs that qualify at polls. And whereas Virginia authorized

1 the use of all college and university IDs, all public employer  
2 and private employer IDs, all public assistance IDs state and  
3 federal, North Carolina limited the types of student and public  
4 employer IDs that could be used. And we've been through the  
5 statistics on the numbers of eligible schools that remain  
6 unapproved, but that number is roughly 60 percent of the  
7 eligible schools did not even apply for their student IDs to be  
8 qualified for use at the polls.

9 North Carolina, as the Court is aware, does not permit the  
10 use of public assistance IDs or private employer IDs, and the  
11 refusal to accept public assistance IDs was a fact that the  
12 Fourth Circuit emphasized in holding that HB589 was designed to  
13 deter black voting with surgical precision, and yet the same  
14 exclusion persists in SB824.

15 And Defendants' explanations for not including public  
16 assistance IDs make little sense. At the time of passage, they  
17 argued that the State did not control issuance of all public  
18 assistance IDs and therefore they couldn't be accepted; but  
19 that's also true of military IDs, passports, and many public  
20 employer and student IDs, all of which are accepted.

21 Now they note that not all public assistance IDs have  
22 photographs, but that explanation begs the question of why the  
23 State could not simply authorize the use of those public  
24 assistance IDs that do bear paragraphs.

25 SB824 also contains Byzantine and unnecessary rules

1 governing the use of expired IDs. If identifying voters is the  
2 rationale for voter ID, it's hard to see why expired IDs cannot  
3 serve that purpose. After all, SB824 separately requires that  
4 qualifying IDs have a picture that resembles the voter, but the  
5 General Assembly still saw fit to include complicated rules for  
6 whom may use an expired ID at the polls and for how long.

7 And, finally, SB824 represents a radical change for  
8 North Carolina, which has never required any form of ID at the  
9 polls in the past. Such an abrupt change in longstanding  
10 policy with respect to voters also indicates that the policy  
11 behind the law is tenuous and offered as a mask for a law that  
12 discriminates against blacks and Latinos.

13 Viewing the Senate Factors through the lens of the calculus  
14 of voting, Professor Burden described how minority voters in  
15 North Carolina experienced higher costs of voting and perceived  
16 fewer benefits even without SB824. Adding a voter  
17 identification law with demonstrated racially discriminatory  
18 effects to the mix only adds to the costs and diminishes the  
19 perceived benefits of voting in a way that discourages minority  
20 participation and results in voters of color having an even  
21 more unequal ability to participate in the political process,  
22 and it does so without any bona fide purpose to justify the  
23 incursion on Plaintiffs' fundamental rights.

24 Plaintiffs therefore satisfied both elements of the Section  
25 2 vote denial claim as stated in the *League of Women Voters*

1 case and we've demonstrated that upon likelihood of success on  
2 that claim it provides an independent basis for this Court to  
3 issue a preliminary injunction.

4 And before I conclude, Your Honor, we want to focus on the  
5 timeline in which the State plans to implement voter ID under  
6 SB824 and that timeline makes matters far worse.

7 North Carolina's primary elections are scheduled for  
8 March 3rd, 2020, three months from today. That's the total  
9 amount of time remaining for implementation of the law,  
10 training of election officials and workers who are charged with  
11 administering its requirements, and educating the public. With  
12 three months to go, a lot of work remains to be done and the  
13 State actually has less than three months to roll out the new  
14 voter ID requirements. Early voting for the 2020 primary  
15 begins on February 12th, about 10 weeks from now, and absentee  
16 voting begins on January 13th, a little over a month from now.

17 With those deadlines in mind, the Court should note that  
18 the State essentially stopped much of its implementation of  
19 SB824 last summer when the General Assembly decided to postpone  
20 the introduction of voter ID until 2020.

21 SBOE Director Karen Brinson Bell states in her declaration  
22 that the State deferred critical tasks like state and county  
23 election official and poll worker training until after the  
24 canvass for the November 2019 municipal elections, which  
25 occurred about two weeks ago.

1       The idea of rolling out a voter ID law in roughly three  
2 months is essentially unheard of. Defendants know that well.  
3 When North Carolina adopted its first voter ID law in 2013, the  
4 General Assembly allowed more than two years for training and  
5 voter education and other implementation tasks before the law  
6 was first implemented in March 2016. Virginia similarly  
7 allowed roughly 20 months after enacting its photo voter ID law  
8 before it was enforced at polls in the November 2014 election.

9       SB824 itself originally would not have required voters to  
10 show photo ID for roughly nine months after its enactment and  
11 the requirement would not have been applied in a general  
12 election for roughly 10 months in most jurisdiction -- and in  
13 most jurisdictions for 11 months. The rollout of SB824 was  
14 intended to occur in 2019, a low turnout municipal election  
15 year. That would have given officials the opportunity for a  
16 test run before enforcing voter ID during a high turnout  
17 presidential contest in 2020 when the governorship and other  
18 statewide offices and the United States Senate seat are all on  
19 the ballot.

20       And the law permitted voters to cast a provisional ballot  
21 in 2019 if they completed a truthful declaration stating that  
22 they were unaware of the photo voter ID requirement. That  
23 option is no longer available for 2020 elections.

24       Now, Defendants seem to implement SB824 in less than three  
25 months. The result, as several witnesses have told this Court,

1 will be confusion at the polls, and the denial and abridgement  
2 of the voting rights of black and Latino voters, in violation  
3 of Section 2. We know from the work done by Professor Barreto  
4 and the review of published literature by Professor Lichtman,  
5 as well as analyses of the State's own data by Professors  
6 Herron and Quinn, that black and Latino voters  
7 disproportionately lack the qualifying identification necessary  
8 to vote.

9 The State argues that those disparities will be cured by  
10 the availability of free ID cards from the DMV and CBOEs, as  
11 well as the reasonable impediment declaration, as we discussed.  
12 But even if that were true -- and we obviously dispute it, as  
13 we did earlier this morning -- there are some serious problems  
14 with the argument from the perspective of eliminating those  
15 disparities within the next three months. It's just not going  
16 to happen.

17 With respect to the free IDs, SBOE Director Bell tells us  
18 that only 1,700 were issued in the first six months they were  
19 available. Even if that pace were to double in the next three  
20 months, fewer than 4,000 free IDs will be issued between now  
21 and March 3rd, and that will make no appreciable difference in  
22 the disproportionate numbers of black and Latino voters who  
23 lack qualifying ID.

24 The low numbers of free ID reveal a more fundamental  
25 problem with rushed implementation. Voters don't know about

1 SB824 generally or its free ID or reasonable impediment  
2 declaration provisions, and there is not enough time to educate  
3 them between now and March 3rd or the earlier dates for early  
4 voting and absentee balloting.

5 Tomas Lopez, who is the executive director at Democracy  
6 North Carolina, tells the Court in his declaration that callers  
7 to an election protection hotline that they ran had many  
8 questions about the voter ID law. They didn't understand what  
9 IDs qualified or how the law operated, and they were not aware  
10 of the existence of a reasonable impediment declaration or that  
11 they might be able to vote without an ID. He believes that  
12 there's not sufficient time to fill in the gaps in voter  
13 knowledge in the next three months.

14 Mr. Lopez also detailed research done by Democracy North  
15 Carolina that showed HB589's voter ID provisions had a  
16 disparate impact on black voters, who, again, comprised  
17 34 percent of those whose ballots were not counted because of  
18 issues with photo ID, but roughly -- but only roughly  
19 20 percent of all those who voted in the March 16  
20 presidential -- 2016 presidential primaries.

21 Mr. Lopez noted that reasonable impediment declarations  
22 were often not provided to voters who should have received them  
23 and that inconsistent standards were applied with respect to  
24 whether reasonable impediment declarations were counted. In  
25 other words, even with more than two years for voter education



1 and training of election officials and poll workers, the former  
2 ID law still had a discriminatory effect on minority voters.  
3 Mr. Lopez believes that similar results are likely, especially  
4 if the State rushes to implement SB824 in three months.

5 And he identifies other aspects of SB824 that are likely to  
6 result in discrimination against black and Latino voters if  
7 rushed implementation proceeds. For example, only 51 of 120  
8 eligible colleges and universities have even applied to have  
9 their student IDs approved for voting and at least 70 of those  
10 institutions will not have qualifying student IDs for the March  
11 elections; and among communities colleges, only 13 of the  
12 roughly 57 have applied to have their IDs approved, meaning  
13 that more than three-quarters of community colleges will not  
14 have qualifying IDs. And those student populations, especially  
15 at the community colleges, are heavily black and Latino.

16 Kate Fellman, who is executive director of You Can Vote,  
17 which educates, registers, and empowers voters to navigate the  
18 voting process, details similar problems with rushed  
19 implementation of SB824. She recalled that even after the  
20 Fourth Circuit struck down HB589 many voters were still  
21 confused about whether they had to show ID at the polls.

22 Ms. Fellman identifies common misconceptions that voters  
23 have reported about SB824. Specifically, voters wrongly  
24 believe that they cannot register to vote or cast a ballot  
25 without a photo ID with a current address. They are confused

1 about whether the same REAL ID that will be required for air  
2 travel in October 2020 is also required to vote in the state of  
3 North Carolina a month later. Many voters who You Can Vote  
4 assisted wrongly believed that voter ID was required in 2019  
5 elections, including in the special elections in congressional  
6 Districts 3 and 9.

7 Especially given the confusion among voters, Ms. Fellman  
8 expressed concern about the State's failure to roll out a mass  
9 communication effort about SB824. She noted that State  
10 educational efforts had been limited. SBOE seminars held prior  
11 to September 2019 were sparsely attended and based on  
12 incomplete information about how the law would operate.

13 Professor Matt Barreto reported that voters he surveyed  
14 were -- overwhelmingly had never heard of the SBOE seminars,  
15 let alone attended one.

16 Now Ms. Fellman believes there is not enough time to  
17 educate voters before the March primaries. She also notes that  
18 rushed implementation would require County Boards to  
19 familiarize themselves with SB824's requirements, train staff,  
20 and recruit and train poll workers in the new requirements of  
21 the law, develop and administrator free voter ID programs, and  
22 educate the public about the law, including by outreach to  
23 voters who lack qualifying ID. That sort of rollout takes  
24 years, if it's even possible.

25 Ms. Fellman notes that legislative changes to voting hours

1 and the continuous changes with regard to the final Saturday  
2 before election day, as well as changes in poll sites, are  
3 likely to add to the confusion that a hastily implemented voter  
4 ID law will create.

5 And she describes the distrust that SB824's changes create  
6 among underserved voters. The law diminishes their confidence  
7 in the electoral system and their desire to participate.  
8 Underserved voters of color see the law as directed at  
9 preventing them from voting and develop the sense that their  
10 vote does not matter, which can cause them to give up on the  
11 process. Like Tomas Lopez, Ms. Fellman believes that rushed  
12 implementation of the law without regard for the concerns of  
13 minority voters is likely to lead to exactly this response by  
14 black and Latino voters.

15 Durham's mayor, Steve Schewel, is also concerned about  
16 rushed implementation. In his declaration, Mayor Schewel  
17 testifies about a program he runs in Durham to help 46,000  
18 residents of that city whose driver's licenses or state IDs  
19 have been suspended or revoked to get them restored. Despite  
20 Mayor Schewel's involvement with the license restoration  
21 project, he indicated to the Court that he was unaware of  
22 SB824's free ID provisions until he was contacted by  
23 Plaintiffs' counsel in this case last month. He believes it is  
24 impossible to educate 46,000 Durham residents with suspended or  
25 revoked licenses about the free ID option between now and the

1 March 2020 primaries.

2       Of course, it's not just Plaintiffs' witnesses whose  
3 declarations provide evidence that rushed implementation of  
4 SB824 will have a discriminatory impact on black and Latino  
5 voters that violate Section 2. SBOE's own executive director  
6 indicates that numerous key aspects of the SB824 rollout are  
7 still in process, as she puts it, even at this late date.  
8 Training sessions for CBOE staff are something Ms. Bell  
9 indicates the State will be rolling out and she admits that  
10 that training did not continue in the second half of 2019.

11       Other critical aspects of the rollout that have not yet  
12 happened include providing training materials for CBOEs to use  
13 with poll workers, offering free IDs at sites other than CBOE  
14 offices, updating voter registration forms, absentee ballot  
15 request forms, and absentee ballot return envelopes which now  
16 must accommodate a photocopy of the voter's identification  
17 card. Nor has the State issued a form reasonable impediment  
18 declaration or regulations for administering the RID process or  
19 training materials about the process. In short, Ms. Bell  
20 concedes that three months before election day the rollout of  
21 SB824 is still very much a work in progress.

22       And other evidence confirms that rushing to implement SB824  
23 by March 3rd will leave voters confused about the law and what  
24 it requires. Professor Barreto's survey results reveal that a  
25 majority of black and Latino voters are not aware of SB824's

1 voter ID requirements. They are frequently mistaken about  
2 whether they possess qualifying ID and are overwhelming  
3 uninformed about whether they can vote without presenting an ID  
4 and whether the law provides for a reasonable impediment  
5 declaration or free IDs for voters who lack other forms of  
6 qualifying ID.

7       These survey results are consistent with Professor Burden's  
8 opinion that the on-again, off-again nature of voter ID in  
9 2019, coupled with numerous aspects of SB824's implementation  
10 that are still in process, including a reasonable impediment  
11 declaration form itself, are likely to result in both voter  
12 confusion about the law and its requirements, and errors by  
13 poll workers and election officials. Professor Burden opines  
14 that this confusion is likely to create challenges for and to  
15 deter voters with fewer resources to navigate the electoral  
16 system who are disproportionately black and Latino.

17       In sum, the rushed implementation of SB824 in March 2020  
18 would have at least three predictable effects:

19       First, it will assure that the free voter ID and reasonable  
20 impediment provisions of SB824 have no material effect on the  
21 disparities in qualifying ID ownership among black, white, and  
22 Latino voters before the law goes into effect.

23       Second, it will deter minority voting by communicating the  
24 clear message that State officials are moving forward with  
25 voter ID without regard for how it affects black and Latino

1 voters.

2 And, third, it will result in black and Latino voters  
3 disproportionately facing heavier burdens in order to cast  
4 their ballots, whether those burdens consist of obtaining new  
5 IDs they don't need except to satisfy SB824, having to fill out  
6 forms at the polling place that white voters disproportionately  
7 do not have to fill out or educating themselves about the  
8 evolving requirements of the new law when the State has not  
9 done enough to inform them.

10 In all of these ways, implementing SB824 in March 2020  
11 would create confusion and likely violate Section 2 of the  
12 Voting Rights Act by disproportionately burdening black and  
13 Latino voters in the exercise of their fundamental rights to  
14 vote; and at the very least, this Court should enjoin the  
15 implementation of SB824 in North Carolina's March 2020  
16 primaries.

17 So I have an apology that applies directly to you, Your  
18 Honor. I stated in my argument that only -- excuse me -- only  
19 one -- there has only been one African American elected to  
20 statewide office in the state of North Carolina. I understand  
21 from cocounsel that the Court of Appeals are statewide offices  
22 and, in fact, Your Honor was elected as a Court of Appeals  
23 justice. With regard to the statewide offices in the Executive  
24 Branch, it remains true that only one African American has ever  
25 been elected to any of those offices in the history of this

1 state. But for obvious reasons, we wanted to correct the  
2 record on that.

3 **THE COURT:** Now, neither of you pointed out to me  
4 witnesses that you believe would be helpful to the Court that  
5 you -- that you would wish to present testimony from. So if I  
6 could hear from you on that point.

7 **MR. ULIN:** Briefly, Your Honor. I think that we could  
8 make a fairly streamlined presentation of evidence to this  
9 Court; and obviously, we're willing to bring any of our  
10 declarants to this courtroom to testify, if that's Your Honor's  
11 wish.

12 **THE COURT:** All right. I'm not asking for this. You  
13 asked for it.

14 **MR. ULIN:** Understood.

15 **THE COURT:** All right. You indicated that there were  
16 eight witnesses that you wanted to present testimony through,  
17 and I'm asking you who are these eight witnesses and how do you  
18 believe it would help the Court in its determination.

19 **MR. ULIN:** So let me focus on five witnesses, if I  
20 may.

21 **THE COURT:** All right.

22 **MR. ULIN:** The first two are expert witnesses. One is  
23 Professor Allan Lichtman from American University and Professor  
24 Lichtman really has comprehensively digested the evidence and  
25 data surrounding principally the racial discriminatory intent

1 that can be discerned from the evidence that, you know,  
2 infected the legislature's enactment of SB824. So Professor  
3 Lichtman would be the first of those. That's the testimony  
4 that he would provide, Your Honor, giving you a comprehensive  
5 evidentiary basis for the discriminatory intent Section 2  
6 claim, which, as we've noted, is coextensive with the  
7 constitutional claims.

8 The second witness would be Professor Barry Burden from the  
9 University of Wisconsin.

10 And I would note Professor Lichtman has testified in a  
11 number of voter ID cases on similar issues, including in the  
12 *McCrory* case where he gave testimony on that very subject he's  
13 referring to, HB589.

14 Professor Barry Burden from the University of Wisconsin  
15 would testify about the calculus of voting, and how the  
16 additional burdens imposed by SB824 and its voter ID  
17 requirements would have a racially discriminatory impact on  
18 black and Latino voters that violates Section 2 under the  
19 results standard and would synthesize the evidence in ways that  
20 we think would be very helpful to Your Honor. Professor Burden  
21 has similarly presented testimony on these issues in other  
22 courts, including in the *McCrory* case.

23 Among the factual witnesses that we think would be helpful  
24 to present to Your Honor would be both Kate Fellman and Tomas  
25 Lopez, who I cited extensively in my arguments: Kate Fellman,



1 the executive director of You Can Vote, and Tomas Lopez, the  
2 executive director of Democracy North Carolina.

3 Democracy North Carolina has done some extensive studies,  
4 which are -- some of which are in the report before Your Honor,  
5 about the impact of the voter ID laws on black and Latino  
6 voters, the experiences that -- and lessons that can be derived  
7 from the 2016 primary election, which was the only election  
8 that ever happened in this state in which a photo voter ID was  
9 required at the polls; and we believe that he might very  
10 helpfully illuminate some of the points that I've just gone  
11 through about why the rushed implementation of this law would  
12 result in a denial of minority voting rights.

13 Kate Fellman would testify on similar issues, but her work  
14 has been through You Can Vote, has principally been with  
15 providing direct services to voters. Therefore, we believe she  
16 could bring that perspective and that on-the-ground efforts  
17 about the actual impacts of the law generally, but especially  
18 of its rushed implementation, to light that -- clearly in a way  
19 that it would inform Your Honor and allow you to evaluate the  
20 strength and credibility of the evidence.

21 And -- so I said five and I should have said six. The  
22 other two would be Reverend T. Anthony Spearman, who is the  
23 chair of the statewide NAACP in North Carolina -- and Reverend  
24 Spearman would testify both about the effects of SB824 on the  
25 members of the NAACP, both his organization and the constituent

1 branches, in terms of its effect on their voting rights. He  
2 would also testify about his own experiences in the  
3 North Carolina legislature during the period in which -- the  
4 very truncated period in which SB824 was considered and passed.

5 And State Senator -- State Senator Floyd McKissick --  
6 Judge, I wanted to make sure I got the first name right as a  
7 person I have not had the pleasure yet of meeting -- who in  
8 his -- who was also active, present, and vocal during the  
9 period during which SB824 was considered at the legislature and  
10 can shed light both on that process, as well as on some of the  
11 evidence that Plaintiffs have -- excuse me -- Defendants have  
12 provided in opposition to our arguments about the truncated  
13 process and how it's indicative of the racially discriminatory  
14 intent.

15 **THE COURT:** And that's information in addition to what  
16 they've already provided in their declarations?

17 **MR. ULIN:** I think it chiefly consists of information  
18 that is in -- of what is in their declarations, but we also  
19 feel that having that live testimony would allow them to expand  
20 beyond what they put in the declarations, would allow  
21 Your Honor to ask questions and derive information that because  
22 of time or space constraints are not contained in those  
23 declarations, and would also allow you to make judgments about  
24 the strength and quality of the evidence that is sort of  
25 uniquely in the role -- in your role as a district judge, allow

1 you to weigh and evaluate the strength of evidence and  
2 credibility of witnesses in a matter that would bolster the  
3 opinion you would ultimately prepare.

4 **THE COURT:** All right. Thank you.

5 We're going to take a 10-minute recess; and when we resume,  
6 I'll hear from you with respect to the Section 2 issue.

7 (A morning recess was taken from 11:53 a.m. until 12:13  
8 p.m.; all parties present.)

9 **THE COURT:** Let me say I owe you all an apology. I  
10 thought it was 11:00. I was halfway through our break when I  
11 realized this is 12:00. So we are going to recess, but I do  
12 want to ask Plaintiffs a question before we do that.

13 You talk about *McCrory* and *McCrory* involved a number of  
14 issues. This is one of those isolated issues. So when we talk  
15 about the surgical precision with which *McCrory* was concerned  
16 about, how does that translate to this situation when we are  
17 only talking about one -- this one isolated provision and how  
18 should the Court consider that information in light of *McCrory*?

19 **MR. ULIN:** Your Honor, I'll try to briefly address  
20 your question in the context of the results claim; and then if  
21 Ms. Swain has anything to add on intent, we'd ask the Court's  
22 indulgence on that.

23 So with regard to the results claim, the *McCrory* court,  
24 while it did consider multiple provisions of an omnibus bill,  
25 did focus analysis specifically on the voter ID law and the

1 impact of that voter ID law, and focused on evidence, some of  
2 which is repeated similarly here and some of which has been  
3 enhanced beyond what was presented in the *McCrory* case.

4 **THE COURT:** Walk we through that.

5 **MR. ULIN:** The *McCrory* case, excuse me, analyzed  
6 issues like the disparate impact of the law, the list of  
7 available IDs and whether those IDs were indicative of a law  
8 that created a disparate impact on minority voters. It focused  
9 on the reasonable impediment declaration and whether that cured  
10 the disparities that the evidence, both there and here,  
11 demonstrate.

12 I think our answer, at least with respect to the results  
13 claim -- and I do want to allow Ms. Swain to address the intent  
14 claim -- is that, yes, *McCrory* was a case about an omnibus  
15 bill, but it did focus -- the Fourth Circuit did engage in  
16 focused, targeted analysis of the voter ID law and found that  
17 that law had sufficient discriminatory impact to sustain the  
18 discriminatory intent claim was affected by discriminatory  
19 intent, and that is discriminatory intent that relates both to  
20 voter ID, as well as to the other provisions of *McCrory*. But  
21 then it's also reflected in numerous other contemporaneous --

22 **THE COURT:** But the discriminatory intent was the  
23 collection of these various provisions and how they surgically  
24 removed --

25 **MR. ULIN:** So two points, and then I do want to allow

1 Ms. Swain to address the question.

2 **THE COURT:** All right.

3 **MR. ULIN:** One, one of the manners in which the  
4 legislature surgically removed black voters from the electoral  
5 in sufficient numbers was to impose a voter ID law that they  
6 knew, based on evidence that was before the legislature, would  
7 disproportionately burden black voters.

8 And, secondly, I would -- the only point that Your Honor  
9 makes that I guess I would take issue with there is the notion  
10 that the discriminatory intent is the variety of provisions in  
11 the HB589 bill. That's a manifestation of the discriminatory  
12 intent.

13 The discriminatory intent reflected in a number of actions  
14 by the North Carolina legislature in the period from at least  
15 2011 and perhaps 2013 through 2018 is an intent to entrench the  
16 Republican majority by diminishing the voting strength of black  
17 and Latino voters because of their race; and that has been  
18 manifested in a number of ways, including in the voter ID  
19 provision of 589 and this voter ID bill and in numerous other  
20 provisions of 589 that the court found discriminatory and in  
21 the racial gerrymandering that the court engaged in in 2011 and  
22 in the passage of a photo voter ID constitutional amendment  
23 that was intended to insulate the legislature's considerations  
24 of a new discriminatory photo voter ID law after it had been  
25 told that what it did the first time around was the infamous

1 methodical race discrimination.

2 Having made those points, I would -- I'm happy to answer  
3 any questions Your Honor has for me, but I would like to allow  
4 Ms. Swain to speak.

5 **THE COURT:** All right. Yes, ma'am.

6 **MS. SWAIN:** Thank you, Your Honor. Two brief points  
7 in addition to what my colleague has just shared.

8 What Mr. Ulin focused on is the motivation, and the  
9 motivation -- and the Fourth Circuit's findings as to  
10 motivation and as to how the *Arlington Heights* factors  
11 encompass that motivation is important here.

12 But important in understanding the finding as to surgical  
13 precision in this case was that the Fourth Circuit in that  
14 instance looked at two sets of choices that the General  
15 Assembly made pre- and post-*Shelby County*.

16 The -- prior to the *Shelby County* decision coming out, the  
17 General Assembly in North Carolina had proposed a pre-*Shelby*  
18 photo voter ID law. When the Fourth Circuit considered the  
19 question of intent, it not only identified that there was a  
20 surgical precision in the choices the General Assembly made in  
21 terms of adding new impediments to the path for black and  
22 Latino voters in the state of North Carolina -- their ultimate  
23 finding only went to African American voters -- but they also  
24 paid particular attention to the choices the General Assembly  
25 made as to which IDs to include and exclude pre- and

1 post-*Shelby* as to the photo voter ID provision itself and other  
2 components of the photo ID provision itself.

3 So it wasn't as though the -- the decision itself doesn't  
4 just go to the omnibus nature. It goes to the intent that  
5 animated choices around the photo ID law itself.

6 **THE COURT:** All right.

7 **MS. SWAIN:** Thank you, Your Honor.

8 **THE COURT:** We are going to take a recess. Why don't  
9 we resume at 1:30 rather than 2:00. Court is recessed until  
10 1:30.

11 (A noon recess was taken from 12:20 p.m. until 1:30 p.m.;  
12 all parties present.)

13 **THE COURT:** Before I hear from the State, let me ask  
14 this question: While under a Section 2 claim you must, of  
15 course, show -- I mean you need not show discriminatory intent,  
16 only impact. However, under a Section 2 claim if you show  
17 discriminatory intent, need you also show discriminatory  
18 impact?

19 **MS. SWAIN:** Your Honor, I will draw your attention to  
20 the *Arlington Heights* factors. The fifth *Arlington Heights*  
21 factor, which goes to the relative circumstantial and direct  
22 evidence bearing on a finding of racial intent, asks whether or  
23 not the action bears more heavily on one race than another. So  
24 the foreseeable impact of a law does bear on the intent  
25 finding. The two are interlinked.

1           **THE COURT:** Okay. I understand.

2           Now, is there anything further you would like to argue with  
3 respect to either of your claims, the Section 2 or the  
4 Fourteenth -- constitutional claims?

5           **MS. SWAIN:** Your Honor, absent reserving opportunity  
6 to provide rebuttal, we have no further argument to make.

7           **THE COURT:** All right. Thank you.

8           **MS. SWAIN:** Thank you.

9           **THE COURT:** At this point let me hear from the State.

10          **MR. COX:** Thank you, Your Honor.

11          Before we went to lunch, Your Honor mentioned that she'd  
12 like to hear first from the State about the Section 2 impact.  
13 Is that the way you would like to proceed or would you like to  
14 have the intent element discussed first, then the effects?

15          **THE COURT:** I'm going to leave it to you to do it as  
16 you see fit based on the arguments that I've heard.

17          **MR. COX:** Your Honor, then I will pick it up where we  
18 left off, which is the any alleged discriminatory effects from  
19 the law.

20          **THE COURT:** All right.

21          **MR. COX:** And I'm Paul Cox with the Attorney General's  
22 office representing the State defendants, for the record.

23          So first off, as an initial matter, I will address  
24 Your Honor's question. I believe that under Section 2 -- I  
25 think the intent claim is a separate claim from the Section 2



1 results claim. The Section 2 results claim is based upon the  
2 language of Section 2(a), which says, you know, any requirement  
3 on voting which results in the denial or abridgement of the  
4 right of a citizen to vote. So it is focused on results. So  
5 that claim really is a results-focused claim.

6 The intent claims under the *Arlington Heights* factor brings  
7 in results or discriminatory impacts into that analysis under  
8 the *Arlington Heights* factor, but I would stress that our  
9 contention is that they're different analyses. One is the  
10 intent analysis. The Section 2 claim, the results claim, is an  
11 effects only analysis.

12 **THE COURT:** All right. Thank you.

13 **MR. COX:** In sum, Your Honor, SB824 permits every  
14 voter to cast a vote and to have that vote counted; and for  
15 that reason, it does not deny or abridge the right to vote for  
16 any protected class, as Section 2 requires.

17 I'll bring Your Honor's attention to the *Lee* case, *Lee*  
18 *versus Virginia State Board of Elections*, the Fourth Circuit  
19 decision from 2016. In that case, it was a Section 2 results  
20 test case; and there's been discussion about the two  
21 elements -- the two modes of analysis for a Section 2 claim.  
22 First is looking at the actual effects -- any discriminatory  
23 effects and the second part is the complex *Gingles* multifactor  
24 analysis that goes along with that.

25 Now, the Fourth Circuit in *Lee* held that you don't actually

1 have to reach the complex *Gingles* factor if you determine that  
2 there is no considerable discriminatory impact from the law.  
3 So it is our contention that the *Gingles* factors actually do  
4 not need to be reached by the Court because the law at issue  
5 here is fairly indistinguishable from the law that the Fourth  
6 Circuit was looking at in the *Lee* case.

7 And I'll go through the -- the provisions of the law that  
8 are similar, how the North Carolina law actually is more voter  
9 friendly in certain ways than the Virginia law, and address  
10 some of the questions that have been raised and the new  
11 arguments that have been raised thus far this morning.

12 **THE COURT:** All right.

13 **MR. COX:** So under SB824, there are ten different  
14 types of ID that are available to be used in voting. There is  
15 the North Carolina driver's license, the nonoperator ID issued  
16 by the DMV, the U.S. passport, North Carolina voter ID that's  
17 issued by the County Boards of Elections, a tribal ID which can  
18 be issued by a federally recognized or state recognized tribe,  
19 any student or public employer ID that's been approved for use  
20 by the State Board of Elections pursuant to the law, and any  
21 driver's license or nonoperator ID that's been issued by  
22 another state as long as it's new voters that have just moved  
23 into the state very recently; and, finally, military IDs and  
24 veteran IDs are available to be used.

25 Now, it is true that in the *Lee* case there were a couple

1 other categories of IDs -- or I should say there were  
2 categories of IDs that didn't have to go through the approval  
3 process. As Mr. Ulin pointed out, the student and employer ID  
4 provisions, I believe, did not have to go through the separate  
5 approval process as they do in North Carolina.

6 Nonetheless, we view that as a fairly minor difference when  
7 looking at the totality of the law here and especially when you  
8 consider the fact that in the *Lee* case the court did not really  
9 focus on the broad range of IDs that are available to be used.  
10 The Court's analysis in the effects analysis was really focused  
11 on the provisions that ameliorated any effects that a law would  
12 have on people who lacked ID, and I think that that's really  
13 important here too.

14 In the Virginia law, much like in the North Carolina law,  
15 there were free voter IDs available from the County Boards of  
16 Elections. Unlike the Virginia law, North Carolina law  
17 actually has a very ample, reasonable impediment exception. If  
18 a voter showed up in Virginia without an ID, they could cast a  
19 provisional ballot, but they could not sign a reasonable  
20 impediment affidavit and automatically have that vote counted  
21 as long as they didn't say something false on the affidavit.  
22 The Virginia law actually required the citizen to still come  
23 back either in person, by fax, e-mail or mail with a copy of  
24 their ID before I believe it's the Friday after voting. So  
25 there was --

1           **THE COURT:** Before you go further, though, I want you  
2 to talk to me about the types of ID that were allowed in Lee  
3 that have not been allowed in North Carolina.

4           **MR. COX:** I believe, Your Honor, that the court did  
5 not focus much on it and I haven't gone back to look at the  
6 exact text of the statute. But from the text of the decision  
7 itself, it appears that there were student IDs and employer IDs  
8 that were automatically allowed to be used. So, in other  
9 words, they did not have to go through an approval process with  
10 the State Board of Elections.

11           **THE COURT:** Do you know whether or not public  
12 assistance IDs were allowed?

13           **MR. COX:** That I don't know.

14           **THE COURT:** All right. Go ahead.

15           **MR. COX:** If my colleague finds that, we will update  
16 the record.

17           **THE COURT:** All right. Thank you.

18           **MR. COX:** One thing I want to correct in the record is  
19 the idea that in North Carolina learner's permits and  
20 provisional licenses --

21           **THE COURT:** Oh, let me ask one more question. I also  
22 want to know were all state and federal IDs allowed that had  
23 photographs and --

24           **MR. COX:** I believe that's right. I believe that is  
25 the case in Virginia and I will correct myself if my colleague

1 finds --

2 **THE COURT:** Which is not the case in this law.

3 **MR. COX:** That's not the case in North Carolina.

4 That's right, Your Honor.

5 **THE COURT:** All right.

6 **MR. COX:** But, again, the focus of the court in the  
7 *Lee* case was on the provisions that address anybody who lacked  
8 an ID. So they held -- the court held that because anybody who  
9 lacks an ID can easily get one from their County Board of  
10 Elections and they could cure their provisional ballot by  
11 returning to the Board of Elections with their ID, the court  
12 held that those provisions would -- would not create any  
13 discriminatory impact on anybody who lacks an ID; and because  
14 the provisions under North Carolina law are even more friendly  
15 for voters when it comes to correcting -- when it comes to  
16 addressing voters who lack ID, we believe that the *Lee* case is  
17 fairly indistinguishable from the law at issue here.

18 **THE COURT:** Well, I'm not sure I agree with that. I  
19 would like to know -- if you're going to make that kind of  
20 comparison, I would like to know exactly what the IDs were in  
21 *Lee* versus here, because if they -- if it's a wide breadth, I  
22 can see why the focus was different. Here we have a  
23 substantial number of IDs that are not allowed. So if you're  
24 going to make that comparison, we need to -- we need to compare  
25 apples to apples.

1 I don't want to stop you. You're --

2 **MR. COX:** No. I do want to answer the Court's  
3 question. The case, as I mentioned, is not very detailed on  
4 the types of IDs that are available. What it does say on the  
5 first page of the opinion is "that a broad range of photo  
6 identification satisfies the photo identification requirement,  
7 including publicly and privately issued forms of identification  
8 whether current or recently expired." And as -- the  
9 North Carolina law allows recently expired IDs and it gives  
10 that one-year grace period.

11 **THE COURT:** You might go back to the District Court  
12 case where the findings were actually made about those IDs, but  
13 I don't want to stop you. I want you to go ahead.

14 **MR. COX:** Yes, Your Honor. We will endeavor to answer  
15 your question for sure.

16 **THE COURT:** Yes.

17 **MR. COX:** One thing I do want to correct is that the  
18 Plaintiffs, both in their argument and the supplemental report  
19 issued with their reply brief by their expert  
20 Professor Lichtman, interprets the photo ID law in  
21 North Carolina as not allowing learner's permits and  
22 provisional licenses. Now, that is not the way the State Board  
23 interprets the law and that is what matters here. We believe  
24 the State Board has the correct interpretation of the law.

25 What has caused the confusion, I believe, is that in the

1 prior version of a photo ID law there was a specific spelling  
2 out of driver's licenses, learner's permits, and provisional  
3 licenses; but in the new law, what it does is it says driver's  
4 license and the next line it includes nontemporary --  
5 nontemporary identification issued by the DMV. So that's the  
6 difference is what -- the new law is subsuming provisional  
7 licenses and learner's permits within that provision for  
8 nontemporary identification.

9           **THE COURT:** So that's why that language was struck  
10 through in the bill?

11           **MR. COX:** That's right, because it still addresses,  
12 still incorporates the same IDs that the Plaintiffs believe  
13 have been lost. It just does it in a different way.

14           We believe that reading is correct because when it says  
15 "nontemporary identification issued by the DMV" -- there's a  
16 specific form of identification that the DMV issues that they  
17 call a temporary license and that temporary license is issued  
18 pursuant to General Statute 20-7(f)(5) and that is when the DMV  
19 issues a temporary driving certificate that is valid for 60  
20 days and that's when an applicant applies to renew their  
21 license by mail or by online form.

22           So that's the way the State Board and that's the way that  
23 we read the statute, as allowing for these nontemporary forms  
24 of identification, such as learner's permits and provisional  
25 licenses, to be used.

1 Now, I also mention that, you know, there's been allusion  
2 to the student and employer IDs. That list has grown; and for  
3 the Court's information and ease of reference to the list of  
4 student and employer IDs, I would like to hand up a  
5 comprehensive list of all those IDs that have been approved.

6 If I may approach, Your Honor?

7 **THE COURT:** You may. Have you shared that with --

8 **MR. COX:** It is just a compilation of the lists that  
9 are on the State Board's website.

10 **THE COURT:** Oh, I see.

11 (Document handed to the Court.)

12 **THE COURT:** And does it include the learner's permits?

13 **MR. COX:** This is just student and employer IDs.

14 **THE COURT:** Oh, just students and employer. I see.  
15 All right.

16 **MR. COX:** The reason we wanted to hand that up is  
17 because the way it exists in the form on the website is there  
18 are three separate lists because there were three stages of  
19 approval that the State Board went through.

20 As the law was originally written, it was fairly strict and  
21 difficult to gain approval for a university or employer ID.  
22 When it -- so during the first round of approvals, a number of  
23 university and employer IDs were rejected because they didn't  
24 meet the language of SB824.

25 In response, the legislature changed the law and made it



1 easier to apply for and get approval of student and employer  
2 IDs; and that has led to, for example, all the UNC constituent  
3 institutions being approved, a number of HBCUs and, you know,  
4 additional community colleges and universities, for example.

5 So I'd also like to address the issue of the disparity in  
6 the possession of IDs. To be candid with the Court, we don't  
7 dispute that there may be a disparity in the possession of the  
8 IDs that are available to be used for voting. What -- what we  
9 caution the Court to be careful about is how that -- how that  
10 is quantified -- how the disparity is quantified and how great  
11 the disparity is.

12 The Plaintiffs have put forward a -- a report in their  
13 reply brief from Professor Barreto that conducted a survey to  
14 determine how many voters lacked ID in North Carolina and I  
15 just want to make a couple points about that survey.

16 To the extent that it is to be relied upon, it should only  
17 be relied upon where Professor Barreto surveys registered  
18 voters. A number of the data points and tables that he  
19 includes in that report address the entire population of people  
20 who could become eligible to vote if they registered; but what  
21 is relevant here is registered voters, of course, because  
22 you're not actually eligible to show up and vote unless you're  
23 a registered voter. So -- and we don't -- we have no way of  
24 knowing if you include the larger universe of North Carolinians  
25 who could be eligible to vote what percentage of those actually

1 would register and show up to vote at the next election. So  
2 the better way to look at that, we believe, is through  
3 registered voters.

4 Another thing that I want to bring to the Court's attention  
5 is that Professor Barreto also included a number of questions  
6 that we believe misleads a little bit about what the -- what  
7 the law is going to require of voters. So, for example, he  
8 asked voters whether the photo on their license matches the way  
9 they look right now. And the State Board has a -- an extensive  
10 rule that addresses this that is designed to not make it so  
11 that you have to have an exact match. And he actually uses the  
12 "exact match" phrase in his report, but an exact match is not  
13 required.

14 The rule that the State Board promulgated to carry out this  
15 provision of the law is -- says that the ID must have any  
16 reasonable resemblance to the voter, and the State Board has  
17 gone through and has extensive rules to address the "reasonable  
18 resemblance" requirement. Those rules are actually --  
19 actually, Your Honor, if it would be all right, I would like to  
20 hand up some materials that might be easier for you to turn to  
21 as I make my presentation.

22 **THE COURT:** That's fine.

23 **MR. COX:** These are simply the filings that we made in  
24 response to the preliminary injunction motion just tabbed for  
25 your ease of finding them.

1           **THE COURT:** All right. Thank you.

2           (Documents handed to the Court.)

3           **THE COURT:** And what should I be looking at at this  
4 point?

5           **MR. COX:** If you could turn to the smaller booklet.  
6 It's the Bell affidavit and then Exhibit C of the Bell  
7 affidavit.

8           **THE COURT:** If you would identify the documents  
9 because the Plaintiffs are going to have to find those same  
10 documents. You didn't provide this to the Plaintiff.

11           **MR. COX:** This is Document No. 97-9. It's the rules  
12 that are on the North Carolina Administrative Code on the  
13 Office of Administrative Hearings website. So they're public  
14 records.

15           So 8 NCAC 17.0101 goes through --

16           **THE COURT:** Wait just a minute. What tab am I looking  
17 at?

18           **MR. COX:** My apologies, Your Honor. Tab C of the Bell  
19 affidavit.

20           **THE COURT:** All right.

21           **MR. ULIN:** Your Honor, may we have counsel give us the  
22 page number that we can refer to from his filing?

23           **THE COURT:** That would be great.

24           **MR. COX:** This is ECF 97-9 and it's the first page --  
25 it's -- oh. Sorry. Page 108 of 195.

1       So the relevant provision is subsection (c)(3) and (c)  
2 reads: "The election official shall inspect any photo  
3 identification provided by the person presenting to vote and  
4 shall determine the following:" -- and then sub (3) -- "that  
5 the photograph appearing on the photo identification bears any  
6 reasonable resemblance to the person presenting to vote. The  
7 election official shall make this determination based on the  
8 totality of the circumstances, construing all evidence, along  
9 with any explanation or documentation voluntarily proffered by  
10 the person presenting to vote, in the light most favorable to  
11 that person. Perceived differences" -- this is critical -- "of  
12 the following features shall not be grounds for the election  
13 official to find that the photograph appearing on the photo  
14 identification does not bear any reasonable resemblance to the  
15 person presenting to vote...."

16       And it goes through a number of factors that would be  
17 common -- would commonly result in a photograph not looking the  
18 same as the person who presents to vote, such as change in  
19 weight, change in hair features and styling, including hairline  
20 length, color, change in facial hair, cosmetics, and tattooing.  
21 And the list goes on.

22       But the reason I bring these out is because the Plaintiffs  
23 in their survey -- Dr. Barreto's survey surveyed respondents to  
24 determine whether their photo ID had changed for any of these  
25 reasons, but under the law and under the rules that have been

1 written and the way that the State Board is having the County  
2 Boards enforce this, those differences should not be counted to  
3 disallow someone's photo ID.

4 The second provision of this I want to bring Your Honor's  
5 attention to is subsection (4), which talks about the name.  
6 And, again, Dr. Barreto goes through whether a respondent to a  
7 survey may have a slightly different name than what appears on  
8 the license, and here the State Board has -- has a similar  
9 provision stating that the name should -- does not have to be  
10 an exact match to the name appearing on the voter registration  
11 record and there should be a totality of circumstances and  
12 considered in the light most favorable to the voter, and the  
13 standard for them to apply is the name on the photo  
14 identification shall be considered substantially equivalent to  
15 the name appearing on the registration record.

16 And it goes through a number of examples of when -- very  
17 common examples of when you might have some discrepancy that  
18 should not be used to disallow that ID. So, for example,  
19 someone who has a three-word name or three-name full names,  
20 such as Mary Beth Smith versus Beth Smith. It goes on. Other  
21 examples including nicknames or variations on names, such as  
22 Bill versus William; initials in the full name, A. B. Sanchez  
23 versus Aaron B. Sanchez; a former name, including maiden names,  
24 which are certainly going to arise. So, you know, this goes --  
25 and typographical errors. Your Honor can see that there are a

1 number of ways that the State Board is interpreting this law to  
2 ensure that it is not too strictly construed to disallow photo  
3 IDs that are presented to them by voters.

4 Then the final provision of the "reasonable resemblance"  
5 provision that I want to bring to the Court's attention is that  
6 even if an election official determines that there is not any  
7 reasonable resemblance on the photograph, it's not that  
8 precinct worker that makes the determination that the ID cannot  
9 be used. The precinct worker has to actually formally  
10 challenge that ID. They go through a challenge process and  
11 that challenge has to be adjudicated by the election judges  
12 that are at the precinct.

13 And Your Honor may know that election judges in  
14 North Carolina are nominated and appointed -- well, they're  
15 nominated by the county parties, the major parties, Democratic  
16 and Republican parties; and the County Board appoints them to  
17 appear at the precincts. It's a set of three judges. The  
18 Governor's party has -- it's the Governor's party has two,  
19 right? Okay. The Governor's party is allowed to have two  
20 versus one of the opposing party. It's not required that it be  
21 that way, but in a typical example, you have at least opposing  
22 party judges. The reason I bring this up is because a decision  
23 there is no reasonable resemblance on a photo ID has to be  
24 unanimous by that bipartisan panel of election judges.

25 So to sum all this up, there are numerous provisions that

1 the State Board has written into the rules that try to protect  
2 a voter from any sort of one-off election official deciding  
3 they don't want to accept that ID. So yet another reason to  
4 take Professor Barreto's conclusions and analysis with a grain  
5 of salt, especially when they relate to extraneous reasons that  
6 someone's ID may not be allowed in his view.

7 (Pause in the proceedings.)

8 **MR. COX:** I'm going to have my colleague explain the  
9 Virginia requirements so we can address the questions by the  
10 Court.

11 **THE COURT:** That would be wonderful. Thank you.

12 **MS. VYSOTSKAYA:** Your Honor, I think the answer to  
13 your question is yes, that the student ID, as long as it has a  
14 photograph, is allowed under Virginia law and also public  
15 assistance IDs, I believe, under my interpretation of that  
16 statute, is allowed as well. Your Honor has access actually to  
17 that statute. It is included as one of our exhibits. It's a  
18 summary of that statute, rather. It's Exhibit 14 in your  
19 Tab 14 and it is page 20 --

20 **THE COURT:** In which booklet?

21 **MS. VYSOTSKAYA:** The main book, Your Honor, the big  
22 book that has our brief and number of exhibits attached to it.

23 **THE COURT:** All right.

24 **MS. VYSOTSKAYA:** It would be Exhibit 14 there.

25 But what I wanted to point out is that Virginia law, unlike

1 North Carolina law, is actually considered to be a strict,  
2 nonphoto ID state. North Carolina is considered to be a  
3 nonstrict, nonphoto ID state. The reason for that difference  
4 is that in Virginia, in order for you to cure your ballot --  
5 let's say you don't have one of the forms of IDs that are  
6 allowed on the Virginia law, but you want to cast a vote. You  
7 are still allowed to cast a provisional vote; but in order for  
8 your vote to count, you have to return to the register of state  
9 office and you have to present your valid ID that is listed in  
10 that statute within three days after the election is over.  
11 There is nothing like a reasonable impediment provision that  
12 Mr. Paul Cox was talking about a second ago. That's why it's  
13 considered to be a strict law, unlike North Carolina's.

14 **THE COURT:** All right. Thank you. So will this give  
15 me --

16 **MS. VYSOTSKAYA:** If you --

17 **THE COURT:** Where in here does it talk about the  
18 Virginia law?

19 **MS. VYSOTSKAYA:** Your Honor, it's in two different  
20 places.

21 **THE COURT:** All right.

22 **MS. VYSOTSKAYA:** It's page -- if you look on page 3  
23 out of 29 -- the designation should be at the very bottom --  
24 there is a Table 1, Voter Identification Laws In Force, that  
25 provides you the divisions that I was talking about. Virginia



1 is in the first column, photo ID "Strict" column; and  
2 North Carolina, if you would look to the next page, is on  
3 nonphoto, "Non-Strict" category.

4 And then if you go towards the end of that exhibit, it will  
5 be page 25. And I apologize. In my, at least, copy it looks  
6 like it's cut up a little bit. But it has the reference to the  
7 statute that requires photo ID in Virginia. It's statute  
8 24.2-643(B) and it contains a description of all the photo --  
9 of all the forms of IDs that are required.

10 **THE COURT:** All right. And who does -- who is this --  
11 who is NCSL?

12 **MS. VYSOTSKAYA:** That's a National Conference of State  
13 Legislatures, a nonpartisan group that supplies support to all  
14 the legislatures throughout the nation.

15 **THE COURT:** All right. But nowhere in here does it  
16 describe the specific IDs that are allowed under Virginia law?

17 **MS. VYSOTSKAYA:** On page 25 it does, Your Honor. It  
18 has a listing of the IDs that are allowed.

19 **THE COURT:** I see.

20 **MS. VYSOTSKAYA:** And one of them -- I think your  
21 question was about a student ID. What it says is that "valid  
22 student ID card from within Virginia if it includes photo" is  
23 considered to be appropriate.

24 And while it doesn't list specifically a public assistance  
25 ID as a permitted form of ID, it would seem to be covered by a

1 provision that says "any other identification card issued by a  
2 government agency of the Commonwealth...."

3 **THE COURT:** Or the United States.

4 **MS. VYSOTSKAYA:** Or the United States.

5 **THE COURT:** And any "employee identification card  
6 containing a photograph of the voter and issued by the employer  
7 of the voter in the ordinary course of the employer's  
8 business."

9 It has some very general provisions here. All right.  
10 Thank you.

11 **MR. COX:** Thank you, Your Honor.

12 Now, turning away from the number of IDs that are available  
13 under the law now to the provision for free photo IDs that are  
14 offered. There are two provisions that allow for the issuance  
15 of free --

16 **THE COURT:** Now, let me just back up. We're just not  
17 talking about number. We're talking about how many people are  
18 going to be excluded by those requirements. So we're not just  
19 talking about the number listed.

20 **MR. COX:** Yes, Your Honor. Yes, Your Honor.

21 So there are two different manners that a person can get a  
22 free voter ID prior to voting in March. One is through, as has  
23 been mentioned before, county voters -- County Boards of  
24 Elections. Those are issued during the normal business hours  
25 of County Boards of Elections. The County Boards also have the

1 ability under rules that have been promulgated by the State  
2 Board under 8 NCAC 17.0107 that allows the County Boards to  
3 send out mobile teams to issue IDs at large gatherings or other  
4 locations within the county to provide further IDs. And then  
5 the second manner is through the provision of the DMV  
6 nonoperator ID or free nonoperator ID and that -- that  
7 provision is available to anyone who can access the DMV.

8 I also want to clarify one issue that may be a source of  
9 confusion arising from Mayor Schewel's affidavit. That was the  
10 Durham mayor who spoke about adults in his city who have lost  
11 their license due to revocation or suspension. There is a  
12 provision in SB824 -- it's Section 1 3(a) of the Session Law --  
13 that allows for automatic -- the DMV to automatically send such  
14 a driver a replacement identification card that can be used for  
15 voting when such a revoked or suspended license is turned in.  
16 So -- so a little more context on that issue is important, we  
17 believe, for the Court.

18 Now, turning from the free voter IDs that are available to  
19 further implementation by the State Board, the Session Law also  
20 directs the State Board to conduct a, quote, aggressive voter  
21 outreach, unquote, campaign. That's Section 1.5(a).

22 So far what has happened is that the State Board has  
23 conducted two public seminars in each county. So that's 200  
24 seminars. That happened in the summer months. So contrary to  
25 what has been presented, it's not that the State Board put on

1 halt all outreach and preparation efforts. I will get to what  
2 I think the Plaintiffs are alluding to in a minute.

3 But on these public seminars in each county, the  
4 outreach -- there's a voter outreach team at the State Board,  
5 and they're the ones that are responsible for these public  
6 seminars, and they've also been reaching out to civic  
7 organizations and conducting additional seminars even outside  
8 of what the law requires them to do. And the State Board has  
9 also recommended to County Boards to host further seminars  
10 between now and March.

11 Now, in July as well --

12 **THE COURT:** You said recommended?

13 **MR. COX:** That's right, Your Honor.

14 **THE COURT:** Uh-huh.

15 **MR. COX:** And that was through a numbered memo -- the  
16 State Board's executive director issues directives and  
17 information to the County Board directors via what they call  
18 numbered memos. And that's a phrase used in the statutes.  
19 It's the official mode of communication by the State election  
20 official, the executive director, to the County Boards. And in  
21 the latest numbered memo, which we intended to bring a copy of,  
22 but it got lost in the shuffle -- we can provide it to the  
23 Court following this hearing -- the executive director is  
24 recommending to County Boards that they conduct such outreach  
25 seminars now that the State Board has conducted two in each

1 county.

2 So also in the summer months, in July, the State Board held  
3 a statewide conference. The State Board conducts two statewide  
4 conferences each year with County Board officials. These  
5 include the staff of the County Boards, as well as the  
6 appointed political members of the County Boards.

7 And at that July conference, the -- well, the general  
8 counsel sitting to my right conducted a presentation about the  
9 upcoming photo ID requirement and we've included a copy of that  
10 presentation along with the Bell affidavit that is in your  
11 materials and that is at exhibit -- I believe it's Exhibit A.  
12 Yeah, it's Exhibit A of the small notebook. And I'd like to  
13 bring Your Honor's attention to some of the presentation that  
14 occurred. And, again, this goes back to the summer.

15 And for cocounsels' information, it is Document 97-9 and  
16 I'm on page 31 of 195.

17 For Your Honor, that's 31 of 195. The docket number should  
18 appear on your copy as well.

19 **THE COURT:** All right.

20 **MR. COX:** This is a brief presentation that the State  
21 Board gave to County Boards on the -- carrying out the photo ID  
22 provisions. Of course, there was no photo ID requirement in  
23 2019, so the State Board was very careful to make sure that the  
24 County Boards knew that and would not be demanding any photo ID  
25 because, as Your Honor may know, we just conducted statewide

1 municipal elections across the state over the last two months  
2 in which there was no photo ID requirement.

3 Especially I would like to bring Your Honor's attention to  
4 the reasonable impediment exceptions.

5 **THE COURT:** Which is on page?

6 **MR. COX:** That's on page 36 of 195.

7 **THE COURT:** All right.

8 **MR. COX:** And here it lists basically from the law  
9 what the reasonable impediment exceptions are. There's a list  
10 of exceptions that the legislature has put into the law. And  
11 then finally under subsection D there, there's "other  
12 reasonable impediment." Any voter is allowed to offer their  
13 own reason for why they had an impediment to bringing the photo  
14 ID in person.

15 Now, the next page, on page 38, also I want to bring  
16 Your Honor's attention to, which it -- it captures what the  
17 State Board has codified in their rulemaking as well, which is  
18 that the reasonable impediment that a voter offers for not  
19 bringing an ID can only be rejected if the County Board has  
20 grounds to believe that the affidavit is false.

21 So what this is saying is that -- and this is straight from  
22 the law's text as well. What this is saying is that if a voter  
23 does not appear with an ID, they're going to be offered the  
24 opportunity to fill out a reasonable impediment affidavit; and  
25 that reasonable impediment affidavit will suffice and their

1 vote will count, unless the County Board has grounds to believe  
2 that what they wrote in that affidavit is false.

3 Now, the State Board has added an additional layer of  
4 protection on top of that in its rules, which is the next  
5 sentence. The "decision that the affidavit is false requires a  
6 unanimous vote of" the County Board of Elections or a CBE, as  
7 it writes there.

8 As Your Honor may know, the County Boards of Elections are  
9 appointed by the political parties. They are nominated by the  
10 political parties and appointed by the Governor. There  
11 currently are three Democratic representatives and two  
12 Republican representatives on each County Board of Elections.  
13 It tends to follow that dynamic based upon the party of the  
14 Governor. They will have the majority of the appointments.  
15 That is important because it's a bipartisan board that must  
16 determine unanimously that there are grounds to disbelieve a  
17 voter when they say they had a reasonable impediment.

18 **THE COURT:** Suppose the voter says, "I do not believe  
19 that the -- I don't have an ID because I don't believe that  
20 this law is constitutional."

21 **MR. COX:** Under the text of the law and the text of  
22 the rule, the County Board would have to conclude that that is  
23 a false statement and have grounds to believe that that's a  
24 false statement.

25 **THE COURT:** How would they do that?

1           **MR. COX:** That is my point, Your Honor. There's no --  
2 there's no way -- the only way that they can reject it is if  
3 they determine that it is a false statement and have grounds to  
4 believe that. And so -- so a statement like that, how would  
5 you -- exactly, how would you determine that it's a falsehood.

6           In our read of the law, there has to be some grounds to  
7 believe -- and this is the exact text -- that there is a  
8 falsehood committed in that affidavit; and admittedly, it's  
9 hard to conceive of how a County Board member would come up  
10 with grounds to believe what the person said was false  
11 unless -- I mean, we can come up with hypothetical situations  
12 where the County Board member knows the person and says, "Oh,  
13 they said they didn't have a car, but they do have a car." But  
14 then they have to get all four other members of the Board to  
15 agree with them that's a falsehood.

16           So the point is the law has a very cabined allowance for  
17 County Boards to reject reasonable impediments; and the  
18 guidance that the State Board is providing to the County Boards  
19 is just that, that there is one way to reject a reasonable  
20 impediment affidavit, and the County Boards have to follow the  
21 letter of the law that's written.

22           Now, there are other exceptions for providing photographic  
23 ID in person. One is that if the person was the victim of a  
24 natural disaster within 100 days prior to the election or if  
25 the person has a religious objection to being photographed,



1 they would, again, sign an affidavit representing that. These  
2 are all found in Section 1.2(a) of the SB824, the Session Law.

3 Now I'd like to respond directly to something that the  
4 Plaintiffs have raised and that their expert Professor Barry  
5 Burden has suggested in his supplement report that was attached  
6 to the reply brief indicating that it's not clear to him at  
7 least how a person's lack of awareness could be considered to  
8 be a reasonable impediment affidavit.

9 And we can go through the same exercise we just recently  
10 had, Your Honor. There's no way I believe or we believe to  
11 conclude that if someone says, "I didn't know I had to bring an  
12 ID" -- there's no way to say -- I mean, we could think of  
13 hypothetical examples, perhaps. There's no way to say, that I  
14 can think of, how a County Board unanimously can determine that  
15 that person stating that they lacked awareness of photo ID is  
16 false. I mean, again, a bipartisan panel of five County Board  
17 members would have to make that determination and have to make  
18 it based upon grounds they believe that statement is false.

19 And, finally, the reasonable impediment provision we do  
20 believe is very critical in this law and the reason it's very  
21 critical, it is -- the law bolsters the idea that no person  
22 should be turned away from the ballot box if they lack ID; and  
23 the law actually directs the State Board in all of its  
24 communications about the photo ID requirement to include the  
25 following statement: All registered voters will be allowed to

1 vote with or without a photo ID card. And that's directly from  
2 the Session Law. That's Section 1.5(a)(10).

3 And the State Board is complying with that in including in  
4 its outreach efforts that statement and making it clear to  
5 voters that while there is a photo identification requirement,  
6 it is not a strict requirement; that if you show up and you do  
7 not have ID, you may vote. And we just went through the ways  
8 that your vote can count, most critically the reasonable  
9 impediment exception.

10 I just touched on some of the ways that the State Board has  
11 been conducting voter outreach and I'll just follow up on that  
12 because I think it's important to understand where the State  
13 Board is and what's to come.

14 First, we talked about the public seminars and the initial  
15 training that took place in July of county officials. In the  
16 2019 municipal elections, the State Board had all County Boards  
17 post informational fliers and posters that were in both English  
18 and Spanish in every precinct and early voting polling  
19 locations in the municipal elections alerting voters to the  
20 fact that they would be required to present photo ID in the  
21 upcoming election in 2020 with the exceptions we've discussed.

22 We've also discussed the mailing that has gone out to  
23 approximately 700,000 voters who the State Board has determined  
24 may not have a DMV-issued ID that could be used in voting  
25 and --

1           **THE COURT:** How did they make that determination?

2           **MR. COX:** They did a matching analysis. They took the  
3 database of the DMV customers and those who actually have a  
4 license or other form of ID that can be used issued by the DMV,  
5 matched that against the voter registration file. And the data  
6 team -- the data scientists at the State Board can conduct a  
7 matching analysis based upon unique identifiers between those  
8 databases. So, for example, social security number matches,  
9 name and date of birth matches between the two databases to  
10 determine -- first, you determine whether there is an exact  
11 match between a person on one database and another database.  
12 That person is not going to be sent a mailing under this rule.

13           After they do that, the State Board conducts a separate  
14 matching analysis to take out any of those voters that were  
15 matched with a DMV record whose DMV record is expired, except  
16 for those who are over 65. As Your Honor may know, if you're  
17 over 65 and your ID expired before your 65th birthday, then  
18 your ID can be used. But -- so the State Board did that second  
19 layer of matching, which is to take out the voters who exist in  
20 the DMV system but have expired licenses.

21           So that's how those two lists combined resulted in the  
22 mailing.

23           And I should also mention, Your Honor, the 700,000 list is  
24 not a definitive list of how many people the State Board  
25 believes do not have qualifying ID for a number of reasons:

1 One, it only addresses DMV-issued ID, of course.

2 Two, it took out all expired IDs for people under 65. And  
3 as you may know, the law allows expired IDs to be used as long  
4 as they're not expired for more than one year.

5 There are also a number of complicated algorithms that can  
6 be applied to that matching analysis that would take out false  
7 matches or false results of people who -- who are on the list  
8 of individuals who the State Board believes may not have an ID  
9 issued by the DMV, but they actually do. And this results from  
10 slight differences in names. It results from typographical  
11 errors in names where matches don't -- or typographical errors  
12 in social security numbers or dates of birth, that sort of  
13 thing, where the match may not be exactly right.

14 And there are ways that a data professional can go about  
15 trying to cull out that list to get to a more refined list, and  
16 that is what happened in the earlier lists that the Plaintiffs  
17 alluded to from the earlier litigation. 2013 and 2014 matching  
18 exercises were done at a much more granular level.

19 But for this purpose, this was for the purpose of sending a  
20 mailing out to North Carolina voters; and the State Board, I  
21 believe in good judgment, determined that they should take an  
22 approach that was going to guarantee that the list would be  
23 overinclusive. So that it's better to send an announcement  
24 that a photo ID is required and you may not have a qualifying  
25 photo ID to a person who actually does have a qualifying photo

1 idea than to neglect to notify a person who actually does not  
2 have a qualifying ID. So the list is designed to be  
3 overinclusive. But that mailing was sent out in September.

4 There is currently a mailing that's going out to every  
5 residential address in North Carolina. It's with the mail  
6 house and should be going out in the next couple of days and  
7 hitting mailboxes the next week.

8 Later in December, potentially hitting mailboxes in the  
9 early part of January, there's going to be a subsequent  
10 mailing.

11 The first mailing going out right now is a large flyer  
12 format that provides general information about the photo ID  
13 requirement. The second mailing that's going out in  
14 December/January will be a -- a more detailed booklet format  
15 that discusses in more detail the requirements of the photo ID  
16 law.

17 And then the Session Law also requires two additional  
18 all-residence mailings to occur in 2020. The State Board  
19 currently is scheduling one to go out in February, so it would  
20 occur before the March primary, and another one to go out  
21 before the general election, so likely sometime in the summer  
22 or early fall.

23 In addition to that, the State Board has put together press  
24 kits to do outreach on its own to its media contacts and also  
25 to give to the County Boards of Elections to do their own media

1 outreach to get the word out about photo ID requirements.

2 In the next few months, the State Board is going to be  
3 conducting in-person and web-based trainings of County Boards.  
4 That training will be recorded and then the County Boards will  
5 then use that to train the poll workers who be working at the  
6 polls in March.

7 I want to make one note that is important to recognize in  
8 terms of election administration. The State Board in its  
9 judgment and particularly in the executive director's judgment,  
10 who has been working in election administration for decades,  
11 made the determination that it would not be a good idea to try  
12 to train poll workers and do an entire voter outreach effort  
13 before the photo ID requirements were going to be required in  
14 the upcoming election.

15 So, in other words, we had elections in 2019 that did not  
16 require photo ID. They included two special congressional  
17 elections. As Your Honor will recall, there was a new election  
18 order for the 9th Congressional District of North Carolina.  
19 There was a new congressional election required in the 3rd  
20 Congressional District due to the death of a congressman, and  
21 then you had statewide municipal and county-level races that  
22 occurred in this year.

23 None of those races required photo ID and the State Board  
24 did not want to -- first, did not want to train poll workers  
25 about photo ID because of fear that someone would be

1 erroneously required to show a photo ID and, the worst-case  
2 scenario, would be disenfranchised because they didn't show a  
3 photo ID when they didn't -- when they never needed to do so;  
4 and, second, so that voters would not be confused about the  
5 requirements for voting.

6 And so that was -- I think that may be part of what the  
7 Plaintiffs were alluding to about a -- a sort of halt to  
8 outreach efforts. Certainly there was not the sort of  
9 full-court press that the State Board is now engaging in when  
10 upcoming elections were not going to be requiring photo ID.

11 As I mentioned, there are two statewide conferences the  
12 State Board conducts. One was -- the last one was conducted in  
13 July. The State Board is going to conduct another one in  
14 February, so before the March primary. All county election  
15 officials should be represented at that conference where there  
16 will be presentations in -- much more detailed presentations  
17 about the photo ID requirements so those county officials can  
18 go back to their locations and ensure that their poll workers  
19 who they are training know how to enforce this law correctly.

20 And then, finally, the State Board is developing the  
21 materials that are going to be used by the poll workers on  
22 election day. The State Board drafts and finalizes these  
23 materials and distributes them to all precinct locations in all  
24 County Boards. They include quick reference guides for poll  
25 workers. There's a thing called a "Station Guide" that all

1 poll workers are familiar with. They flip to the section on  
2 photo ID if they have any question and it tells them exactly  
3 what they're supposed to do.

4 So now turning back where I started, on the cases that have  
5 addressed the photo ID requirements, and I mentioned the *Lee*  
6 case. We do believe it's hard to distinguish this case from  
7 the *Lee* case, especially when you consider the fact that in  
8 Virginia if you fail to bring an ID to the polls -- whether you  
9 have an ID or not, if you fail to bring an ID to the polls, you  
10 can't fill out a reasonable impediment affidavit. You have to  
11 cure that provisional ballot by sending in a copy of your ID or  
12 appearing with a copy of your ID at the polls. So we do  
13 believe that in a way the North Carolina law is actually  
14 less -- has less of an impact on voters because it is not quite  
15 as strict.

16 In the Fifth Circuit case, the *Veasey versus Abbott* case,  
17 from 2018, the Fifth Circuit reversed a preliminary injunction  
18 against the law where the District Court failed to account for  
19 the reasonable impediment exception. Again, you know, the  
20 court there found the reasonable impediment exception important  
21 to analyzing the impacts on voters.

22 The Seventh Circuit looking at Wisconsin's photo ID in the  
23 *Frank v. Walker* case, that was a case where Wisconsin law  
24 allowed fewer IDs to be used than North Carolina does and like  
25 the Virginia law required the voter to bring their IDs to the



1 Board of Elections afterwards if they failed to present it when  
2 they're voting.

3 And then the South Carolina law was upheld in front of a  
4 three-judge panel of the DC District Court in a Section 5 claim  
5 under the Voting Rights Act, which is a little bit different;  
6 but at the same time, it is focused on any discriminatory  
7 results. And the court determined that there were no  
8 discriminatory results, honing in particularly on the  
9 reasonable impediment exception, which is nearly identical to  
10 North Carolina's reasonable impediment exception. The court  
11 held there that the South Carolina law, quote, might have posed  
12 a problem for South Carolina's law under the strict effects  
13 test under Section 5, but the sweeping reasonable impediment  
14 provision eliminates any disproportionate effects or material  
15 burden that South Carolina's voter ID law otherwise might have  
16 caused.

17 And then, finally, the District Court in Alabama in the  
18 *Greater Birmingham Ministries* case we cite looked at Alabama's  
19 photo ID law and determined there was no discriminatory impact  
20 under the Voting Rights Act. That law, unlike North Carolina's  
21 law, did not include a reasonable impediment provision. It had  
22 a similar set of IDs.

23 So finally a few words on the *McCrory* case. The *McCrory*  
24 case is -- is instructive in some regards, but obviously  
25 distinguishable in others.

1 One is something Your Honor asked about earlier, which is  
2 the Fourth Circuit's focus on the cumulative effects of the  
3 provisions that were in the prior law. You know, the court  
4 used language like panoply of voting restrictions that  
5 cumulatively resulted in disenfranchisement. That's at 231.  
6 And the court said, quote, the sheer number of restrictive  
7 provisions in Session Law 2013-381 distinguishes this case from  
8 others.

9 And there it was talking about distinguishing the case from  
10 other cases where it was only the photo ID element that was at  
11 issue, so, for example, the *Crawford* case, which the Defendants  
12 brought up to the Fourth Circuit in the *McCrory* case. The  
13 *McCrory* court distinguished the prior law from what was at  
14 issue in *Crawford* because in *Crawford* it was just a photo ID  
15 law, unlike the one at issue in *McCrory*.

16 Now, other differences is that the prior law -- the new  
17 law, with regards to the prior law, has additional IDs that can  
18 be used, including the student/employer IDs that we've  
19 discussed. It also includes the one-year grace period for  
20 expired IDs.

21 It's true that the prior law was amended late in the  
22 litigation to allow expired IDs up to four years to be used,  
23 but as far as I can tell, the Fourth Circuit didn't look at the  
24 expiration date issue as relevant in any way and it may not  
25 even have considered that. The Fourth Circuit did not consider

1 the amendments as part of the actual law. If Your Honor looks  
2 at that decision, the amendments to the prior photo ID and  
3 other voter restriction law occurred on the eve of trial; and  
4 the way that the Fourth Circuit looked at that amendment was in  
5 the remedial section of the analysis.

6 So the court looked at discriminatory intent of the  
7 original law, determined that there is a violation of the  
8 Voting Rights Act based upon an intent analysis, and then did a  
9 separate analysis where it determined whether the amendment  
10 remedied the violation that had already been found.

11 So we argue that the case that the Fourth Circuit was  
12 looking at was not the same -- same idea as the law at issue  
13 here. The law at issue here is one package. You're not --  
14 you're not supposed to look at any provisions that might burden  
15 voters and disregard any provisions that might ameliorate that  
16 burden. The sequence of events in the *McCrory* case  
17 distinguishes that case from this one.

18 **THE COURT:** So if it is found that the legislature  
19 took the laws in *McCrory* and just split them up into different  
20 laws, does that make it nondiscriminatory? Just put them in  
21 separate bills.

22 **MR. COX:** No, Your Honor.

23 **THE COURT:** You put voter education here, you put this  
24 one in this bill, and you look at them in isolation?

25 **MR. COX:** I believe, Your Honor, that you would -- you

1 know, a court could consider a number of laws together in the  
2 same challenge to make a -- an argument about discriminatory  
3 intent. Certainly in that case all of them were packaged into  
4 one law. Here we don't have -- we don't have a series of laws  
5 to gum together for the analysis, so we don't have that problem  
6 to address. Here we literally only have the photo ID  
7 requirement.

8 So we -- we think that for that reason the panoply, as the  
9 Fourth Circuit talked about, of laws that were found to have  
10 targeted black voters with surgical precision is not  
11 instructive to a simple photo ID law that other courts have  
12 upheld in similar circumstances on their own.

13 **THE COURT:** But in *McCrory*, you're talking about  
14 principally the same legislators. You're talking principally  
15 about -- the laws may be slightly different. They now have  
16 been packaged in different places. They are separate laws, as  
17 opposed to all packaged together. Does that make -- does that  
18 remove some of the taint that was found in *McCrory*?

19 **MR. COX:** Your Honor, certainly the provisions that  
20 have changed in the law do remove any determination by the  
21 Fourth Circuit that the photo ID provisions of the prior law  
22 were -- resulted in discriminatory effects.

23 The -- in particular, the reasonable impediment provision  
24 is very different in the very prior law. In the prior law, it  
25 wasn't just that a County Board of Elections could reject a

1 ballot that was provided under reasonable impediment if it was  
2 found to be false. That was one of the reasons.

3 There were two other reasons and those reasons gave the  
4 County Board lots of authority to adjudicate those reasonable  
5 impediment reasons: For one, if the County Board determined  
6 that the reason given was nonsensical or, two, that the reason  
7 given, quote, merely denigrated the photo identification  
8 requirement.

9 And we can think of a lot of reasons that a County Board  
10 official would determine that, you know, a voter was  
11 denigrating the requirement by not complying with the law.  
12 Those -- those subjective determinations have been removed from  
13 the current law and, in addition, the State Board has imposed  
14 an unanimity requirement on the County Board of Elections that  
15 did not -- that was not in force in the prior law. So there  
16 are these protections that guarantee that voters that go the  
17 reasonable impediment route, as long as they don't demonstrably  
18 lie on their affidavit, will have their vote counted.

19 There are a couple other provisions from the earlier law  
20 that changed with respect to reasonable impediments. In the  
21 prior law, any voter could challenge someone's reasonable  
22 impediment reasons; and, you know, that's a recipe for  
23 shenanigans, of course. If someone puts in a reasonable  
24 impediment affidavit, they leave the voting location, and then  
25 someone comes in and challenges that, they might or might not

1 learn that that challenge is taking place and be able to defend  
2 themselves. You know, they're supposed to be able to. But,  
3 you know, there's no such process of challenging someone's  
4 reasonable impediment under the current law.

5 I mention also the change from the majority vote to a  
6 unanimous decision by the bipartisan board.

7 And, finally, what is also important is that the prior  
8 reasonable impediment provision still required the voter to  
9 present some form of ID. So you would fill out a reasonable  
10 impediment affidavit, but you would still have to provide a --  
11 the State Board calls it a HAVA document. HAVA stands for the  
12 Help America Vote Act. You know, these are bank statements,  
13 utility bills, things like that that would provide a  
14 nonphotographic form of an ID that could be used to  
15 substantiate your reasonable impediment affidavit. The  
16 alternative would be to provide your name, address, social  
17 security number, and there might be another personal identifier  
18 that you have to provide as well.

19 But, you know, that is not required at all in the new law.  
20 What you put down in your reasonable impediment affidavit is  
21 your reasons, you sign the affidavit, and then the County Board  
22 must accept that affidavit, unless it has grounds to believe  
23 unanimously that the affidavit is false.

24 Your Honor, I think that concludes my discussion on why we  
25 believe the Session Law does not have a discriminatory effect

1 under the Section 2 analysis. Unless Your Honor has questions,  
2 I will turn it to my colleague, Ms. Vysotskaya, to discuss the  
3 intent claim.

4 **THE COURT:** All right. Thank you.

5 **MR. COX:** Thank you.

6 **MS. VYSOTSKAYA:** I wanted -- before I talk about the  
7 intent, I wanted to jump back to Your Honor's question about  
8 *McCrory*, where you had a law that packaged multiple limitations  
9 and restrictions on voting patterns and practices that were  
10 used predominantly by African Americans.

11 And Your Honor asked, well, what if you have those pieces,  
12 you know, packaged differently in different pieces of law?  
13 Does this make the law that is on challenge today any less  
14 discriminatory? And the answer to that has to be of course it  
15 would not make the question -- the law in question any less  
16 discriminatory if Plaintiffs brought their challenge to several  
17 laws in one single complaint.

18 Of course, they could not do that here because the  
19 practices the *McCrory* court discussed have been enjoined and  
20 are not currently present in North Carolina electoral statutes.  
21 In *McCrory*, for example, as the Court pointed out, that -- oh.  
22 And one big elephant *McCrory* really contained as well is the  
23 General Assembly there requested racial data through their  
24 expert and has then patterned the law using that racial data to  
25 specifically restrict the types of practices that African

1 Americans used. We don't have this here at all, but there is  
2 no --

3 **THE COURT:** How do you know -- you have many of the  
4 same legislators. How do you know that data wasn't -- they  
5 knew what the data was, so how do you know that data wasn't  
6 used? Why wasn't that data used to move the age from 65 --  
7 from 70 to 65 on the -- I mean, how do I know that wasn't based  
8 on data?

9 **MS. VYSOTSKAYA:** We know that because, Your Honor,  
10 before you -- and we have submitted that to you -- we have the  
11 legislative hearing transcripts. It's one of the exhibits that  
12 the Board has transmitted as part of its response to a motion  
13 for preliminary injunction and what those legislative hearings  
14 make patently clear is that the law was simply patterned after  
15 the South Carolina law. So the language is not taken from any  
16 data. The language is almost identical to the law that  
17 South Carolina has passed and that has already passed judicial  
18 scrutiny.

19 And, Your Honor, for example, November 28, 2018, Senate  
20 debate, page 3 -- it's a huge book, but I could read what was  
21 said during the presentation of the law. Specifically, the  
22 legislator stated, "We modeled this bill on South Carolina's  
23 law because it has already been through federal scrutiny with a  
24 judges' panel." And that reference appears in several spots of  
25 that legislative debate. And if you compare the language of



1 the laws -- and my colleague has already, for example, referred  
2 to a reasonable impediment provision -- it is nearly identical  
3 to the law in North Carolina.

4 Also, very similar language appears in the section that  
5 describes the purpose behind the North Carolina voter ID law  
6 and the purpose -- it's going to be your Tab No. 1. That's  
7 just the voter ID law itself and on page 3 of that tab this--

8 **THE COURT:** It's Tab No. 1 of which book?

9 **MS. VYSOTSKAYA:** The big book, Your Honor.

10 **THE COURT:** The large one. All right.

11 **MS. VYSOTSKAYA:** The purpose of the voter ID law is to  
12 confirm that the person presenting to vote is the registered  
13 voter on the voter registration records. That is -- almost  
14 identically traces the language in the South Carolina law.

15 I also did want to make a point about the legislature being  
16 exactly the same. According to Professor Lichtman and the  
17 table that was presented to you -- I believe it was Table  
18 No. 11 that was shown on the screen -- actually what that table  
19 shows is that the composition of the legislature was different.  
20 There is no information in that table about the Democratic  
21 party's composition of the legislature at the time when SB824  
22 was passed, but there is a percentage that is listed of those  
23 Republicans who were present in the legislature during 2013  
24 when the previous law was passed, so would have had access to  
25 the data, and those who were in the legislature when SB824 was

1 passed. And in the Senate, I believe the percentage was only  
2 52 or so percent -- it was just slightly over 50 -- of the same  
3 senators who sat --

4 **THE COURT:** But the leaders of this whole effort were  
5 a part of that legislature and are now a part of this law as  
6 well, the leaders of that effort.

7 **MS. VYSOTSKAYA:** That is correct, Your Honor.

8 **THE COURT:** All right.

9 **MS. VYSOTSKAYA:** The leaders were.

10 **THE COURT:** All right.

11 **MS. VYSOTSKAYA:** The percentages are different. There  
12 is a 52, I believe, or 53 or so that have remained and the --  
13 from the Republican side and the others were different. And  
14 then we have about 60 -- slightly above 60 percent on the House  
15 side as well.

16 While the leaders did remain, what they passed in this  
17 legislation is quite different from the legislation that was  
18 passed in SB824. The content of the law itself -- and Mr. Cox  
19 has already described it -- it contains a reasonable impediment  
20 provision that is quite sweeping that was not the kind of  
21 reasonable impediment provision that the legislature tried to  
22 incorporate into a previous voter ID law on the eve of  
23 litigation. It's completely different.

24 It's also -- the reasonable impediment provision itself was  
25 included into this voter ID law from the very beginning, unlike

1 in the previous iteration of the law.

2 The -- there are -- certain IDs were added that did not  
3 appear in the previous iteration of the law and some of these  
4 IDs will benefit African Americans at larger proportions than  
5 the proportions that reside in North Carolina, for example, the  
6 student ID -- student IDs. We have about 12 HBCUs in  
7 North Carolina and 10 of them were approved already for  
8 presentation of their IDs as valid forms of IDs during the  
9 elections in 2020.

10 Also, the public employment IDs, we have evidence here,  
11 Your Honor, from OSHR in our booklet that shows that over  
12 30 percent of the public employees working for the state of  
13 North Carolina are African Americans. That is also a higher  
14 percentage than African Americans who reside in North Carolina  
15 population and yet the legislature has incorporated those IDs  
16 into at least --

17 **THE COURT:** Tell me why they didn't incorporate the  
18 public assistance.

19 **MS. VYSOTSKAYA:** Your Honor, it also does appear in  
20 the legislative record. There were several concerns raised.  
21 The one concern was that many public assistance IDs do not  
22 contain a photograph.

23 **THE COURT:** Could you not have had a provision on  
24 those that contain photographs?

25 **MS. VYSOTSKAYA:** It could have been --

1           **THE COURT:** What did you do with the veterans and the  
2 military?

3           **MS. VYSOTSKAYA:** It -- those are -- so the veterans'  
4 IDs --

5           **THE COURT:** All have photographs?

6           **MS. VYSOTSKAYA:** The ones that have photographs are  
7 part of the IDs that are allowed in North Carolina.

8           It could have been -- there could have been amendment made  
9 to the legislation that would have specified that only those  
10 public IDs that -- public assistance IDs that contain  
11 photographs are the kind of IDs that would be accepted, but  
12 that specific type of amendment -- by the way, the  
13 legislature -- the Republican side of the legislature expressed  
14 specifically willingness to consider that kind of amendment if  
15 it would have been presented -- it's cited in our brief -- and  
16 that specific language was never presented.

17           The language of the amendment that was presented simply  
18 refers to public assistance IDs and our record shows that a  
19 Medicaid card does not have a photograph, for example. A  
20 Medicare card does not have a photograph. A number of food  
21 stamp type of identifications do not have a photograph.

22           Now, Plaintiffs did in their reply brief present evidence  
23 that some public housing authorities issue IDs with  
24 photographs, but that evidence also shows that every public  
25 housing authority ID is different in format. That was another

1 concern that was expressed by the legislature, that differences  
2 in the formats may confuse the poll workers, may make the list  
3 more confusing.

4 So those are the two concerns that were expressed during  
5 the legislative debates and no specific limiting language was  
6 presented.

7 **THE COURT:** Why would a public assistance ID be any  
8 more confusing to them than something they don't see on a  
9 regular basis, like a tribal ID? I'm just -- I feel like  
10 excuses are being made and I don't really understand it. I  
11 just don't understand.

12 **MS. VYSOTSKAYA:** So I'm not sure how to answer that  
13 precise question.

14 **THE COURT:** All right.

15 **MS. VYSOTSKAYA:** I can only refer to the legislative  
16 record in front of the Court and refer the Court to -- and we  
17 cite that in our brief -- the specific places where the  
18 concerns have been expressed about the fact that not all IDs  
19 have photographs and that those that do are different. And  
20 also part of this legislative record is that not -- a narrower  
21 amendment to SB824 was not presented by either Democratic  
22 opponents, nor by Republicans.

23 **THE COURT:** Thank you. You've addressed it.

24 **MS. VYSOTSKAYA:** Now, getting to -- Your Honor, to the  
25 intent part.

1           **THE COURT:** Yes.

2           **MS. VYSOTSKAYA:** So I wanted to start -- before we  
3 focus on *Arlington Heights* factors, I wanted to highlight to  
4 the Court one thing that makes this law different from many  
5 other laws that have been passed and that survived judicial  
6 scrutiny and also from a prior VIVA attempt, prior voter ID law  
7 attempt.

8           What we have here that is very unique is the fact that the  
9 North Carolinians themselves have voted and passed the  
10 constitutional amendment that specifically requires a  
11 presentation of a photo ID in order to vote. In November --  
12 the constitution -- in November -- on November 8th in 2018, the  
13 people of North Carolina have approved a constitutional  
14 amendment and the Constitution now reads in two places as  
15 follows: "Voters offering to vote in person shall present  
16 photographic identification before voting," period. "The  
17 General Assembly shall enact general laws governing the  
18 requirement of such photographic identification, which may  
19 include exceptions." So the voters approved the requirement of  
20 photo ID presentation.

21           **THE COURT:** So do you -- are you suggesting that I  
22 start -- if I'm going to look at the history and motivation of  
23 our legislators, I start with the amendment?

24           **MS. VYSOTSKAYA:** No, Your Honor.

25           **THE COURT:** All right.

1           **MS. VYSOTSKAYA:** And our brief has been quite honest  
2 and fair on that point. We did not quarrel in any way with the  
3 judicial findings from *McCrary* or a number of other courts  
4 which have acknowledged shameful history of discrimination in  
5 the state of North Carolina that is linked to race. That is  
6 not the argument we have made. That history is there and that  
7 is one, I believe -- out of all *Arlington Heights* factors, that  
8 is probably the weakest factor for our case. What  
9 constitutional -- and there are a number of laws that the  
10 legislature has passed that has been found to be discriminatory  
11 both by federal courts and by the state court, and some of them  
12 are currently pending. So we have that history.

13           What makes this different is that here the legislature did  
14 propose that constitutional amendment among five different  
15 other amendments. Two amendments actually went down, people  
16 didn't approve them. But people provide a severance -- not a  
17 severance, but the weakening of the historical factor that, in  
18 all honesty, weighs against us. The fact that the people have  
19 required now a photo ID requirement severs or weakens that  
20 historical point.

21           The fact that the legislature, while it was similar but was  
22 different, that passed this voter ID law as well -- we just  
23 talked about percentages and Professor Lichtman's table that  
24 shows the legislature -- composition of the legislature was  
25 different -- also weakens that past history as it connects or

1 as it relates to this voter ID law.

2 Once the constitutional amendment was passed, the  
3 legislature had no -- no constitutional or statutory authority  
4 to disregard what people told the legislature to do, which was  
5 to enact voter ID laws.

6 **THE COURT:** I don't think anybody in here has  
7 suggested that that in and of itself violates anything.

8 **MS. VYSOTSKAYA:** That's right, Your Honor.

9 **THE COURT:** That's not being challenged.

10 **MS. VYSOTSKAYA:** So what we have then next is we have  
11 to look at the substance of the law itself and Mr. Cox  
12 discussed it. It's a law that has been considered to be one of  
13 more lenient laws because it contains at least 10 different  
14 types of IDs that are accepted for voting, because even those  
15 people who do not possess these types of IDs would be allowed  
16 to vote if they either -- either write or -- not write, cast,  
17 rather, a provisional ballot and then return with the  
18 communication within 10 days after the election to show a photo  
19 ID and make the provisional ballot valid. Or if they have a  
20 reasonable impediment that prevented them from voting, they  
21 could -- instead of casting a regular provisional ballot, they  
22 could -- they could use a reasonable impediment provisional  
23 ballot that does not require those voters to return and to --  
24 to prove that they have a photo ID. It allows them to cast a  
25 ballot without any proof of having a photo ID.



1       Also, this law contains obviously what has been discussed,  
2 provisions for free photo IDs. The photo IDs could be issued  
3 by two different methods. DMV could issue free voter IDs to  
4 North Carolina voters; and if a person does not have required  
5 documents in order to receive a free ID from DMV, the State is  
6 required to provide those documents to voters free of charge.

7       If the voter does not want to go through that procedure,  
8 this law that has been enacted allows a voter to receive a free  
9 voter ID from County Board of Education -- Elections, rather;  
10 and in order to receive that type of voter ID, no documentation  
11 presentation is required at all. The voter is simply required  
12 to provide his name, date of birth, and last four digits of  
13 social security number, and the free ID would be issued.

14       So the type of ID that the legislature enacted after people  
15 mandated the legislature to enact a law combined together  
16 lessens the impact of history, while certainly, once again,  
17 Your Honor, we acknowledge that it's one of our weaker factors  
18 in *Arlington Heights* analysis.

19       Moving to -- moving to the next factor in *Arlington*  
20 *Heights*, the courts usually look at the sequence of events that  
21 led up to the enactment of the voter ID or the law that is  
22 being challenged; and in this case, once again, we have a  
23 constitutional amendment, a critical step that occurred leading  
24 up to the enactment of the voter ID law.

25       But also there is a broader picture for the past, I don't

1 know, 10, 20 years. There has been a nationwide trend for the  
2 states to use a photo ID requirement as one way of verifying  
3 the voters are who they say they are, and our evidence we  
4 presented -- now, *Crawford* recognized that obviously itself,  
5 that there is a trend for the states to now require photo IDs  
6 of greater quantity.

7 But also Carter-Baker report, a golden standard that has  
8 been cited in multiple court cases, including *Crawford*  
9 itself -- and that would be your Exhibit No. 13 that was  
10 submitted -- it talks about that growing nationwide trend and  
11 it talks about the fact that photo IDs serve to increase the  
12 voter confidence in the integrity of the elections because the  
13 voters know that the presentation of a photo ID makes the fact  
14 that the voter is the one who appears on the registration -- on  
15 the voter registration more likely.

16 So there is that background, nationwide trend towards  
17 adoption of more IDs; and more than 20 states now require photo  
18 IDs in order for voters to vote.

19 North Carolina itself has made attempts to enact a voter ID  
20 for the -- it hasn't started with *McCrory*. It has started  
21 with -- about -- in about 2011 or so when the legislature first  
22 attempted to enact voter ID and Governor Perdue has vetoed  
23 that. The legislature did not override the veto. So it  
24 started way back, that attempt -- that effort, that legislative  
25 priority for adoption of a photographic ID requirement.

1       There is nothing that suggests intent to discriminate based  
2 on racial lines, the fact that the legislature had a preference  
3 towards enactment of a photographic photo ID requirement. In  
4 fact, right before the legislature has enacted this voter ID  
5 law, there have been patterns of fraud and impropriety in the  
6 absentee vote as, of course, was well publicized in  
7 congressional District 9. And -- and this law, this voter ID  
8 law actually includes a requirement for absentee voters to  
9 provide a photographic ID when they return their ballots to the  
10 Board.

11       So there is some evidence that at least in absentee -- in  
12 absentee arena that there has been fraud and improprieties  
13 occurring; and because of that, it is not unreasonable for a  
14 legislature to enact the idea that would increase voter  
15 confidence in the results of that -- of the elections.

16           **THE COURT:** Was 824 -- was that a part of 824 in the  
17 beginning or did that happen at a later time? Was it amended  
18 to include the absentee?

19           **MS. VYSOTSKAYA:** I can check, Your Honor. If it was  
20 amended, it was -- it was amended during the process of  
21 enactment. It's within the body of that law, so it wasn't a  
22 separate set of laws that came later.

23           **THE COURT:** All right.

24           **MS. VYSOTSKAYA:** And, Your Honor, while we're talking  
25 about some absentee issues, really *Crawford* said -- *Crawford*

1 and *Lee* both said that the state does not have to wait for  
2 voter fraud to occur before it enacts a voter ID, that the  
3 state could use a voter ID in a manner and as a way of  
4 preventing voter fraud from occurring.

5 And in *Lee*, actually the evidence of fraud was very  
6 limited. There is a footnote there that talks about several  
7 instances of in-person fraud and that was all the evidence that  
8 *Lee* court discussed and yet that voter ID law has not been  
9 declared to be discriminatory. It was an intent based on --

10 **THE COURT:** But it didn't have the same history as  
11 we're talking about here.

12 **MS. VYSOTSKAYA:** Yes, Your Honor, I agree it did not.  
13 So the history is -- the factor of history, getting back to  
14 that first factor, is something different to North Carolina if  
15 you compare that law to the Virginia law specifically.

16 **THE COURT:** In *Lee*, not only did it not have the  
17 history, it didn't -- it has a much more expansive list. It  
18 includes all federal IDs. It includes all employer IDs. So  
19 it's a much more expansive list than that that we're looking at  
20 here.

21 **MS. VYSOTSKAYA:** The list itself, Your Honor, I agree  
22 it is a more expansive list.

23 **THE COURT:** The lack of history, as well as the  
24 expansive list, to me, takes it out of my consideration.

25 **MS. VYSOTSKAYA:** But I think what makes this law

1 unique and it is better if compared to Virginia's law in that  
2 respect is that we have a reasonable impediment provision that  
3 the Virginia law did not have.

4       So Virginia law actually did identify a disparity in the  
5 rates of possessions of qualified IDs. Even with all the lists  
6 that they have, there were several percentage points that the  
7 court itself discusses in the opinion where African American  
8 voters were maybe 2 percent point, I believe, less likely to  
9 have those qualifying IDs and the Virginia law would not have  
10 allowed them to cast a reasonable impediment provision. The  
11 Virginia law would have required those folks to come back to  
12 the register's office within three days after election and it  
13 would have required them to present their IDs.

14       What we have here, while the list is more limited, voters  
15 who do not have qualified IDs are still going to be permitted  
16 to vote. They would have to fill out either -- they would have  
17 to fill out a reasonable impediment provision form. So that  
18 makes it better than the Virginia law that we have been  
19 discussing.

20       Also, Your Honor, the other factor that *Arlington Heights*  
21 and *McCrory* both discussed is the departures from normal  
22 procedural sequence, and *McCrory* -- the departures that were  
23 discussed by the court in *McCrory* were quite prominent. The  
24 court in *McCrory* talked about a much more modest voter ID law  
25 sitting without any legislative action for months while --

1 while the legislature was awaiting for results of the *Shelby*  
2 case.

3 As soon as *Shelby* case came, the law that was -- much more  
4 modest law, that was previously about 16 pages long, swelled  
5 into a 50-plus pages bill, the omnibus bill that we were all  
6 just talking about where multiple practices by African  
7 Americans, according to *McCrory*, were targeted with surgical  
8 precision. This is not what we have here. So we don't have --  
9 so there was that.

10 There was also -- that's a -- the departure from a regular  
11 procedural sequence in *McCrory* was that House failed to send  
12 the bill -- the omnibus bill to any committee hearing and  
13 *McCrory* emphasized that, that was very unusual in terms of a  
14 regular procedural process.

15 We have multiple committee hearings here both at Senate  
16 level and at the House level, and Your Honor has evidence of  
17 that in front of her. Elections committee heard it. There was  
18 an Oversight Committee. There were several committee hearings.

19 In *Veasey versus Abbott*, there were several unprecedented  
20 procedural departures as well that the Court has looked at when  
21 it found that law to be unlawful; and in that case, the  
22 legislature actually suspended a two-thirds required vote on  
23 the number of required votes in order to pass that legislation.  
24 That was unprecedented and the court emphasized that.

25 And in *Veasey*, also the legislature -- that's a Texas case,

1 Your Honor, and in Veasey, the legislature also failed to  
2 submit a fiscal note, even though the legislation specifically  
3 required a submission of fiscal note for that case because  
4 there was a huge budget shortcut that year in the state. So  
5 all of those things were looked at.

6 We have -- while it was -- and I'll give that to Plaintiff.  
7 It was maybe a faster process maybe than it could have been,  
8 but certainly not unprecedented for purposes of enacting laws.  
9 The bill was presented -- the constitutional amendment was  
10 passed on November 6th. Twenty days later the bill was  
11 presented and discussed in the Oversight Committee. The  
12 legislative hearing transcript makes it quite clear that the  
13 bill was actually circulated to the legislative body, to the  
14 Democrats and Republicans, a week before it was presented on  
15 the floor. The bill was filed actually in this case not just  
16 by Republicans but also by a Democratic senator, Joel Ford. It  
17 was sponsored by him as well. The bill received several Senate  
18 committee hearings. It was placed on the calendar. It was  
19 debated.

20 There were eleven amendments offered to the bill. Many of  
21 them were Democratic amendments and six amendments adopted,  
22 including amendments that were proposed by -- by the declarant  
23 of Plaintiffs, McKissick, who changed the bill in three  
24 different ways in his amendments. One way he changed it is  
25 that natural disaster exception, for example, was moved from 60

1 days -- the national disaster had to occur 60 days prior to  
2 elections to 100 days. That was one of the amendments that was  
3 accepted. There was an amendment that increased the expiration  
4 date on the voter -- on the free voter ID from being valid from  
5 eight years to ten years. That was one of the amendments that  
6 was accepted and approved and is part of this bill now.

7 It also received several Senate committee hearings. It was  
8 placed on the calendar at the House. It received several House  
9 committee hearings, including the House Elections committee  
10 hearing. Twelve amendments were offered in the House. Many of  
11 them were Democratic amendments. Seven, more than half, of  
12 those amendments were adopted.

13 The legislature -- legislators on both sides were allowed  
14 to speak. The record is quite clear on that. And several of  
15 the declarants for Plaintiffs spoke at the hearing and many of  
16 those praised the process. For example -- I apologize, Your  
17 Honor. I need to find my place here. For example, Senator  
18 Woodard, Democratic senator, spoke and what he said -- and that  
19 appears on the hearing date of November 28, 2018, during the  
20 Senate floor debate during the second hearing, page 17 of that  
21 transcript. Senator Woodard said, "This bill isn't as  
22 restrictive or burdensome as some of us feared and the second  
23 draft is better than what the Oversight Committee saw on  
24 Monday....We appreciate the dialogue and the 34 changes that  
25 Senator Krawiec cited."



1 Similarly, Senator McKissick spoke and he spoke -- he spoke  
2 multiple times. But during the second reading, for example, on  
3 November 28th -- and that appears on page 48 of November 28  
4 Senate floor debate -- Senator McKissick said, "I think the  
5 effort made to bring forth legislation that I see here today is  
6 an earnest effort to try to expand it significantly beyond what  
7 it was when the last voter ID bill came before us, which was  
8 actually stricken down by the courts as being unconstitutional.  
9 I appreciate the fact that this bill is far more broad and far  
10 more expansive."

11 In the House, there are references also to Democratic  
12 representatives thanking the fact that the leadership of the  
13 General Assembly has reached across the aisle and that it  
14 included the Democrats into the debate process. There is also  
15 an acknowledgment during the House debate that this law is much  
16 different from the VIVA law that was enacted, that it's more  
17 broad, that it's more expansive.

18 Plaintiffs have made an argument about the fact that this  
19 law was passed during the lame-duck session. We actually had a  
20 motion to stay partially based on that ground at the very  
21 beginning of this litigation because the state courts are  
22 currently still deciding whether or not a gerrymandered  
23 lame-duck legislature is entitled or can pass a constitutional  
24 amendment as the one that we that have -- attempt here.

25 But Plaintiffs in this litigation don't even challenge the

1 constitutional amendment itself; and until the North Carolina  
2 state courts or federal courts, if such challenge is ever  
3 raised, decide that a legislature that is racially  
4 gerrymandered and that is sitting in lame-duck session cannot  
5 pass laws, we have to accept that it can.

6 And it has been passing laws in lame-duck sessions for a  
7 long time and Senator Joel Ford talks about that, about the  
8 fact that lame-duck sessions of the legislature have been  
9 passing laws. And he's talking about the fact that he  
10 considered it to be his duty as a senator to enact legislation  
11 even during the lame duck because he is -- he was still a  
12 sitting senator and he still worked for the people at that  
13 period of time.

14 I also believe that they cited several cases in their  
15 amicus brief that support the proposition that malapportioned  
16 legislatures can still pass laws and that it doesn't cast a  
17 shade of discriminatory intent when such thing occurs.

18 The legislative history of this act is another factor that  
19 the Court looks at, and one of the things that makes this law  
20 different and somewhat similar to the *Lee* case is the fact that  
21 this law had bipartisan support. In *Lee*, the court cited the  
22 fact that one Democrat and one Independent voted for that voter  
23 ID measure. We have actually in this law more than that. The  
24 bill was cosponsored by a Democrat. Two Democratic senators  
25 voted for it during the Senate part of the bill enactment. Two

1 House Democrats voted for it. One Democrat voted for the bill  
2 when the bill was presented on a motion to concur after it  
3 passed -- there was a House process and went back for  
4 concurrence of two diverging bills. The veto override itself  
5 was achieved with some support from the Democrats in both  
6 chambers. That's one of the factors that Lee considered  
7 important and that is a factor clearly that is present here on  
8 the legislative history side.

9 The fact that amendments offered by Democrats were allowed  
10 also place in favor of this law. We talked about specific  
11 amendments that were offered, for example, by  
12 Senator McKissick. There were others and that's included as  
13 part of our presentation. I think we have it -- we have some  
14 examples cited in our brief. But it's also Exhibit 17 of  
15 the State defendants and Exhibit 17B specifically contains the  
16 legislative history of Senate Bill 824 and it lists the  
17 amendments that they passed.

18 **THE COURT:** Of which book?

19 **MS. VYSOTSKAYA:** It's the big book, Your Honor, and  
20 it's Exhibit 17. It would be Docket Entry 97-18 in the  
21 electronic records and the exhibit that I was referring to  
22 would be Exhibit 17B.

23 Also, the transcript of the debates itself shows which  
24 different amendments were introduced by the Democratic Senators  
25 and Representatives.

1 Here also, Your Honor, unlike in -- unlike in *McCrory*,  
2 there is no evidence that this legislative body has requested  
3 racial data.

4 **THE COURT:** Has what now?

5 **MS. VYSOTSKAYA:** Had requested racial data about the  
6 types of IDs possessed by the minorities. What -- instead, the  
7 evidence that we have before us is that the law was patterned  
8 after the South Carolina law and actually expanded on that  
9 South Carolina law in terms of the IDs that were allowed.  
10 South Carolina law does not allow public assistance IDs, for  
11 example, either, but North Carolina has several additional  
12 types of IDs that are allowed. That came as part of amendments  
13 process, et cetera.

14 And Mr. Cox has addressed -- I think he analyzed correctly  
15 the fact that intent usually includes some of the burdens  
16 analysis, so he talked about the burdens already. I don't want  
17 to repeat his analysis.

18 But the totality of these factors -- and I'm not saying  
19 that all of the factors are perfect. There are problems. You  
20 want to emphasize the biggest one, the history, I think, that  
21 nobody can be blind to. It's there and it shows some racial  
22 tensions and history that is linked to voting that is -- in  
23 North Carolina that is unique.

24 But the totality of the factors is what the Court has to  
25 consider; and in the totality of all of these factors of how

1 the law was enacted and especially the kind of law that was  
2 enacted, that allows wide range of IDs, that allows several  
3 ameliorative measures, that provides several types of free  
4 IDs -- in totality of all of that, we believe that Your Honor  
5 should deny the preliminary injunction request that is based on  
6 the suggestion that this law was based with discriminatory  
7 intent.

8 **THE COURT:** I have no questions.

9 **MS. VYSOTSKAYA:** Thank you.

10 **THE COURT:** Do you care to respond?

11 **MR. ULIN:** Your Honor, I think we can -- if the Court  
12 would indulge us a five-minute recess, it might allow us to  
13 respond in a more orderly way.

14 **THE COURT:** All right. Let's take a 10-minute recess.

15 **MR. ULIN:** Thank you, Your Honor.

16 (An afternoon recess was taken from 3:25 p.m. until  
17 3:50 p.m.; all parties present.)

18 **THE COURT:** Before I hear from Plaintiffs, there's one  
19 more question that I'd like to ask Defendants. In your brief,  
20 you state that "Under *Anderson-Burdick* line of cases, courts  
21 first determine whether the challenged legislation burdens a  
22 constitutional right, and then scrutinize the degree of the  
23 burden against the governmental interest....Plaintiffs waived  
24 any claim that they are likely to succeed on that basis by  
25 failing to present argument under this standard." Explain.

1           **MR. COX:** Yes, Your Honor.

2           When we were responding to Plaintiffs' brief supporting  
3 their preliminary injunction motion, we found little to no  
4 discussion of the constitutional standards that would govern  
5 their constitutional claims. The Plaintiffs would have to  
6 present the *Anderson-Burdick* balancing framework and discuss  
7 why either the law presents a severe burden and is therefore  
8 subject to strict scrutiny or that the law presents a lessened  
9 severe burden and therefore must be justified by the  
10 governmental interests at issue.

11          The *Anderson-Burdick* framework is a sliding scale analysis,  
12 as the Court may know. Unless it's subject to strict scrutiny  
13 and is a severe burden, the level of interest that must justify  
14 the law slide to -- depending upon the level of burden.

15          So if it's a limited burden, as we would submit that this  
16 is, the government interest that the Supreme Court announced in  
17 *Crawford* -- again, *Crawford* was a sliding scale  
18 *Anderson-Burdick* analysis -- the analysis of the *Crawford* court  
19 would apply here and would not invalidate the law.

20           **THE COURT:** All right. Let me hear from you.

21           **MR. ULIN:** Your Honor, our position is that on the  
22 intent claim that the same proof that establishes  
23 discriminatory intent in a vote denial case, which is what this  
24 is, simultaneously establishes our Fourteenth and Fifteenth  
25 Amendment causes of action; that the claims are coextensive.

1 So the evidence of discriminatory intent that establishes that  
2 the legislature enacted SB824 intending to -- with intent to  
3 discriminate against black and Latino voters and the evidence  
4 that the law, in fact, had that impact under the *Arlington*  
5 *Heights* analysis and then, obviously, subsequently in our  
6 results case makes out everything we need to demonstrate to  
7 prove a claim of violation of the Fourteenth and Fifteenth  
8 Amendments.

9 **THE COURT:** All right. I did not want that to go  
10 unaddressed and that's why I asked that question.

11 All right. I will hear from you on rebuttal.

12 **MR. ULIN:** Your Honor, the recess had its intended  
13 effect, and my cocounsel were able to convince me that I have  
14 only two points to make to Your Honor, but you may rest assured  
15 that Ms. Swain has additional points.

16 **THE COURT:** And let me point out we still have three  
17 other factors, but those factors I think we can discuss pretty  
18 quickly.

19 So, yes, sir, go ahead.

20 **MR. ULIN:** So, first of all, I believe that many of  
21 the points that I would have rebutted are points that we made  
22 in our opening arguments to Your Honor and therefore are in the  
23 record this morning and this afternoon as well.

24 **THE COURT:** Yes.

25 **MR. ULIN:** I would point to two things raised by

1 opposing counsel in their argument. First was an argument  
2 about what weight the Court should give to the survey evidence  
3 presented from Dr. Matt Barreto from UCLA. The first thing  
4 that we heard was that the Court should only consider  
5 Dr. Barreto's survey evidence and his report to the extent that  
6 he reported on trends among registered voters, as opposed to --  
7 and not to the extent that it reported on trends among eligible  
8 voters.

9 But, of course, eligible voters are the folks who are  
10 entitled to protection under the Voting Rights Act, not solely  
11 registered voters; and the voter ID law has -- as the evidence  
12 that we put before Your Honor, arguments we've made  
13 demonstrates, there's a number of things that affect both  
14 eligible and registered voters. For one, it has a strong  
15 deterrent effect that keeps people both away from the polls and  
16 the evidence that we presented to Your Honor, keeps them from  
17 registering to vote.

18 So we would submit that in considering the discriminatory  
19 effects of the voter ID law, it's important for the Court to  
20 consider both their effects on eligible voters and their  
21 effects on -- on registered voters and their effects on  
22 eligible voters. That's particularly true when we consider  
23 that this case is focused on the effects of the voter ID law on  
24 black and Latino voters in North Carolina, and those are  
25 populations which we have seen in recent elections have been



1 participating at much higher rates than we've ever seen before,  
2 strongly suggesting that there are a lot of new voters in that  
3 voter population. For black folks, that has been a trend that  
4 began around 2008, continued throughout this decade. For  
5 Latino voters, that trend appears to have begun around 2016 and  
6 continued in 2018.

7 So the effect of a voter ID law on eligible voters is  
8 highly relevant to the effect of that same law on black and  
9 Latino voters in North Carolina when so many eligible voters  
10 who had not presumably been registered and had not previously  
11 participated given the turnout rates in this state are  
12 participating for the first time in recent elections.

13 It's also notable in this regard that North Carolina is a  
14 same-day registration state. So the notion that someone is  
15 ineligible, a voter who is not registered but won't be affected  
16 by a voter ID law, is, frankly, not true because that person  
17 could easily register on the same day and then simply go out  
18 and vote.

19 So it's important for the Court to consider Dr. Barreto's  
20 evidence both with respect to registered voters and with  
21 respect to eligible voters.

22 We had argument, sorry, that Dr. Barreto's focus on the --  
23 on these questions about photo match, that is, whether the  
24 photo resembles the voter, misstated the standard in the law,  
25 which counsel referred to and quoted the law as a "reasonable

1 resemblance" standard.

2 First of all, we would also -- as a preliminary matter, we  
3 take issue with counsel's description of the "photo match"  
4 requirement as an extraneous reason why someone might be turned  
5 away from the polls under the voter ID law. The voter ID law  
6 requires there to be a photo match. Now, admittedly, that's a  
7 "reasonable resemblance" standard; but if the photo doesn't  
8 reasonably resemble, then the ID doesn't qualify under SB824,  
9 which is a significant aspect of what we've been here  
10 discussing today.

11 But I'll read you Dr. Barreto's question in the survey:  
12 "As you may be aware, the North Carolina photo ID law requires  
13 an election board worker to verify that the picture on your ID  
14 is a reasonable resemblance to your current appearance." In  
15 other words, Dr. Barreto used the exact same language in the  
16 statute that counsel quoted in his survey on whether voters had  
17 an ID that satisfied the "photo match" requirement of SB824.

18 The last point on Barreto is that counsel raised the issue  
19 of Dr. Barreto asking questions about whether the name matched  
20 perfectly as between the voter record and the identification,  
21 and counsel pointed out that the statute actually doesn't  
22 require or the SBOE guidance on the statute doesn't actually  
23 require an exact name match.

24 The "name match" question was in a series of three or four  
25 questions that Dr. Barreto included in his survey and explained

1 in his report to Your Honor. It was designed to test whether  
2 there were additional impediments not required by law that  
3 might nonetheless interfere with the voter's ability to vote or  
4 to have his or her ID accepted at the polling place and based  
5 on experience both in North Carolina and other states in the  
6 implementation of voter ID laws.

7 So Dr. Barreto asked that question advisedly and explained  
8 in so many words to the Court about a factor that might not be  
9 strictly required under the law but might yet be very  
10 significant as relates to the impact of this law on someone's  
11 ability to go into a polling place, have their ID accepted, and  
12 cast a ballot. Those are the points on Dr. Barreto.

13 The second point I want to raise is just an equal --  
14 another point of factual correction and it relates to counsel's  
15 description of what information that's reported on the website  
16 of the National Conference of State Legislatures, NCSL.

17 Counsel referred to the NCSL -- and this is a point they  
18 made in their briefing as well -- referred to the NCSL website  
19 as indicating that Virginia, on the one hand, was a  
20 strict/photo ID state; but on the other hand, North Carolina  
21 was a nonstrict/photo ID state. And, in fact, that's a  
22 misstatement of what the NCSL website really says and we  
23 clarified this for Your Honor in the supplemental expert report  
24 of Professor Barry Burden and Professor Burden -- I think it's  
25 easiest just to refer to Dr. Burden's report.

1 Professor Burden indicates that when you go on the NCSL  
2 website and you hover over North Carolina on the map of states,  
3 the description provided is that the North Carolina law is "no  
4 document required to vote, a 2013 voter ID law has been struck  
5 down." And the state is also colored in gray, which on the  
6 website indicates no document required to vote. When -- and  
7 that's because the table to which Plaintiffs refer or the  
8 graphic which Plaintiffs refer refers to what the NCSL  
9 indicates as laws in effect in 2019. In other words, a  
10 North Carolina regime where SB824 is not in effect because it  
11 doesn't come into effect until 2020.

12 So the comparison being made between strict and nonstrict  
13 is really one that has no bearing on this case because the NCSL  
14 website is describing the difference between Virginia's voter  
15 ID law and the state of play in North Carolina today when there  
16 is no voter ID law in effect. It's not comparing the two voter  
17 ID laws and Dr. Burden made that clear in his supplemental  
18 expert report, which was submitted in support of our reply  
19 brief to Your Honor.

20 **THE COURT:** All right.

21 **MR. ULIN:** Unless Your Honor has questions, I'll let  
22 Ms. Swain raise a few additional points.

23 **THE COURT:** All right. Yes, ma'am.

24 **MS. SWAIN:** Yes, Your Honor. A few key points.

25 First, I would like to just address briefly Defendants'

1 position that the public assistance ID amendment that was  
2 offered went to nonphoto IDs and I would just direct the  
3 Court's attention to Dr. Lichtman's surrebuttal report at  
4 page 15 which details how the amendment, Amendment A13, was  
5 proposed as an addition to the version of the bill under  
6 consideration at the time. That addition would go directly  
7 underneath a bill entitled "Requirement for Photo  
8 Identification to Vote in Person." Just as military IDs or  
9 veteran IDs were listed there, this public assistance ID  
10 amendment, by definition, in the statute would only go to  
11 public assistance IDs that had photos on them.

12 So I think that the statute is very clear on that, though  
13 we understand that this is a position that Plaintiff -- the  
14 Defendants have brought forward. We think that if you review  
15 Dr. Lichtman's analysis and the legislative record, it's very  
16 clear.

17 Secondly, Your Honor, we would like to note that the  
18 Defendants do not dispute the disparity -- the racial disparity  
19 in possession rates but rather the number, as they have shared  
20 here today. We believe that it -- to go back to one of the  
21 questions that you asked earlier about the difference between  
22 the proof under the *Arlington Heights* factors where you are --  
23 where Plaintiffs may -- where the Court may need to consider  
24 whether or not the provision bears more heavily on one race  
25 versus another, I would just point Your Honor to the *McCrary*

1 decision where they -- where the Court of Appeals helpfully  
2 lays out the difference between the burden required under  
3 *Arlington Heights* and the burden required under a results  
4 analysis. We believe that this concession by Defendants and  
5 just -- and what the record evidence shows meets that factor  
6 that the law bears more heavily on African American and Latino  
7 voters than it does on white voters.

8 Finally, just a couple more -- a few more points. I'd like  
9 to just draw the Court's attention to Courtney Patterson's  
10 declaration, which is Exhibit 12 in Plaintiffs' preliminary  
11 injunction motion, to paragraphs 9, 10, and 12, which go  
12 directly to the July training and the experience of a County  
13 Board of Elections member as to the training provided thus far  
14 by the State.

15 And we also just want to note that while we understand that  
16 the State is planning a February training for all County Board  
17 of Elections members, the election schedule, as detailed in  
18 Kate Fellman's declaration, Exhibit 13, begins January 13th  
19 and -- and before when absentee ballots may begin to be  
20 submitted; and February 13th, of course, is the first day of  
21 early voting.

22 Finally, we would note that the constitutional amendment in  
23 this case, which the Defendants I think today identified does  
24 not sever the Court's ability to review its -- the previous  
25 history, also does not itself have some additional bearing as

1 to the intent of the General Assembly that wipes clean their  
2 motives. I think that we covered this very extensively in our  
3 opening remarks, but we'd be happy to speak additionally to why  
4 the constitutional amendment does not weaken the case, as  
5 Defendants have noted. Plaintiffs do not need to separately  
6 challenge the constitutional amendment or SB325, the amendment  
7 that went to early voting hours and the Saturday day of -- last  
8 Saturday of early voting, in order for the Court to identify  
9 that evidence as relevant to the intent analysis. It's -- I  
10 think that that speaks for itself.

11 And, finally, Your Honor is correct that absentee ballots  
12 and any photo voter ID requirement as to absentee ballots was  
13 not included in either the constitutional amendment that was  
14 originally proposed by Defendants in this case, nor was it  
15 included in the original SB824 bill. In fact, it was  
16 explicitly rejected at the outset by David Lewis. And I'm  
17 happy to get a cite for you to the legislative record as to  
18 that. It was only after what Defendants have termed the  
19 improprieties in Bladen County took place that that amendment  
20 was ultimately accepted under national pressure.

21 And we'll just note again for the Court the specific  
22 improprieties that the Defendants have identified here and that  
23 we know to be the case in Bladen County was a form of election  
24 fraud that would not be -- have -- voter ID has no relationship  
25 to solving that problem.

1 I believe that that is all from Plaintiffs, except one last  
2 point, which is the lame-duck session has one more aspect to it  
3 that we think is important to bring to your attention; that is,  
4 that the General Assembly during that period came back to  
5 address two issues: Hurricane relief and this constitutional  
6 amendment.

7 On the day that SB824 was proposed, more than a thousand  
8 North Carolinians came to the General Assembly, as Reverend  
9 Spearman details in his declaration, to say, "Do not pass photo  
10 voter ID during this lame-duck session. Allow a duly-elected  
11 General Assembly to pass it and concentrate instead on the real  
12 issues that are before this state." Those issues included the  
13 hurricane relief and the national scrutiny that was coming out  
14 around CD9.

15 Instead, the General Assembly made the choice to rush  
16 through in a very compressed timeline the consideration of this  
17 bill, and we believe that that in and of itself is an essential  
18 component in understanding the pretext here.

19 Thank you, Your Honor.

20 **THE COURT:** Thank you.

21 Anything further? You don't have to.

22 **MR. COX:** Understood, Your Honor.

23 **THE COURT:** I will give you an opportunity.

24 **MR. COX:** I will just make -- because there was no  
25 discussion of the "poll observer" provision, I would just make



1 the point very briefly that even if the number of poll  
2 observers that the parties can appoint statewide is increased  
3 by the bill, the State's rules that govern the conduct of poll  
4 observers has not changed. And those rules are found in 0 --  
5 excuse me -- 8 North Carolina Administrative Code 20.0101, and  
6 it prescribes the conduct by poll observers pretty strictly and  
7 holds that a chief judge can kick a poll observer out if that  
8 poll observer is interfering with voters in any way.

9 **THE COURT:** Thank you.

10 Now let me hear from Plaintiffs on the three additional  
11 factors under preliminary injunction relief.

12 **MR. ULIN:** Thank you, Your Honor. And I think we can  
13 be fairly brief on these points.

14 **THE COURT:** Yes.

15 **MR. ULIN:** So the very fact that we get to the  
16 analysis of the other injunctive relief factors presumes -- and  
17 I'm not suggesting Your Honor has reached this conclusion, but  
18 the fact we get to this point in the analysis presumes  
19 Plaintiffs have prevailed on their -- the first element,  
20 establishing a likelihood of success on at least one of their  
21 claims under the Voting Rights Act or the federal Constitution.  
22 Therefore, the other three elements of the preliminary  
23 injunction standard need to be analyzed in that light.

24 I'll turn first to the irreparable harm. So the case law  
25 which we've cited in our brief, including *Reynolds versus Sims*

1 and the Fourth Circuit's decision in *United States versus City*  
2 *of Cambridge*, establish a well-known point: That the loss of a  
3 fundamental right in general and the right to vote in  
4 particular is irreparable, irreparable for no matter how long a  
5 period of time you lose it and particularly irreparable if you  
6 lose it and it affects your ability to participate in an  
7 election.

8 And that's exactly what we're talking about here, at least  
9 enjoining this loss so that it doesn't affect the fundamental  
10 rights of North Carolina's black and Latino voters in the  
11 March 2020 elections. That's especially true where, as here,  
12 the loss of that fundamental right comes as the result of  
13 intentional race discrimination by the General Assembly.

14 That's our point on irreparable harm. We believe those  
15 points establish irreparable harm and allow Plaintiffs, if they  
16 have met their burden on likelihood of success, move on to the  
17 other factors.

18 The next factor would be the balance of hardships or  
19 balance of equities, depending how the Court articulates it.  
20 Plaintiffs' hardships in this case are similar to their  
21 irreparable harm. Their hardships are the loss of the right to  
22 vote and the ability to participate in the political process  
23 and to choose leaders who are responsive to their interests,  
24 unlike the General Assembly, which, as we have demonstrated,  
25 has been significantly unresponsive, especially when it comes

1 to black and Latino voters' interests in the voting realm.

2 It's also that -- I'm sorry. That hardship that Plaintiffs  
3 suffer in addition to simply being deprived of their right to  
4 vote is also the hardship of being subjected to intentional  
5 race discrimination by a General Assembly that put its own  
6 political interests above Plaintiffs' right to vote and receive  
7 fair representation. That's the Plaintiffs' side of the  
8 ledger. On the other side the ledger, the State of North  
9 Carolina simply has no interest in enforcing a law that  
10 violates the Voting Rights Act and/or the federal constitution.  
11 Therefore, the balance of equities, assuming, again, that we  
12 have established our likelihood of success on the merits, tips  
13 heavily in favor of the issuance of an injunction.

14 Finally, the public interest. And this argument is  
15 similar. The public interest is served by assuring that all  
16 people have an equal opportunity to participate in the  
17 political process and elect candidates of their choice. The  
18 public interest also lies in assuring that the General Assembly  
19 does not engage in intentional race discrimination in the  
20 enactment of voting laws or ever.

21 The Defendants make a series of arguments on these points  
22 that essentially rest on their view that they will prevail on  
23 the merits. Again, if that's correct, we don't get to these  
24 issues and therefore that's not the proper lens with which to  
25 engage in this analysis of the other three preliminary

1 injunction factors, but I will focus on two of the arguments  
2 they make.

3 They cite Chief Justice Roberts' in-chambers opinion for  
4 the proposition that a state suffers harm whenever a law is  
5 enjoined, but that's palpably untrue if that law is found to  
6 have violated the Voting Rights Act or the federal constitution  
7 because the state has no interest to be harmed.

8 And they argue that an injunction will disrupt their  
9 implementation plans for SB824; but if there is a violation of  
10 the Voting Rights Act and the Constitution proved in this case,  
11 as we believe there has been, then those implementation plans  
12 should be disrupted.

13 And the administrative convenience of rolling out a law  
14 that violates the voting rights of people of color is simply  
15 not a cognizable interest. The notion that we should allow a  
16 law that violates the Voting Rights Act to go into effect  
17 because to do otherwise might create confusion among voters or  
18 to do otherwise might interfere with the State Board of  
19 Elections' implementation plans for that law is simply  
20 incomprehensible.

21 So we close where we began. The interests that compel this  
22 Court to issue an injunction and strike down SB824 are the  
23 interests of black and Latino voters in exercising their  
24 fundamental right to vote and their interests in being free  
25 from race discrimination by the General Assembly in the realm

1 of voting or in any realm; and assuming that's what the Court  
2 finds, those interests find no match on the other side of the  
3 ledger.

4 Thank you, Your Honor.

5 **THE COURT:** Thank you.

6 Yes.

7 **MR. COX:** Thank you, Your Honor. Very briefly.

8 On the irreparable harm point, I'm going to make a point  
9 that will sound like a technicality, but it's not. Plaintiff  
10 just argued that the Plaintiffs will be harmed because they  
11 will not be able to vote or their vote will be infringed. The  
12 Plaintiffs here are organizations. That sounds like a  
13 technicality. Organizations, obviously, can't vote.

14 But the reason I make that point is because the Plaintiffs  
15 have brought forward no single voter who can prove that they  
16 will not be able to cast a vote and have that vote counted  
17 under SB824. Because of the numerous provisions that we've  
18 gone through today, especially the reasonable impediment  
19 provision, they've not provided a single voter who can prove to  
20 the Court that "I will not be able to cast a vote that will be  
21 counted on election day."

22 So we would submit that the irreparable harm is not as  
23 strong as Plaintiffs' counsel --

24 **THE COURT:** What about those voters that would be  
25 dissuaded?

1           **MR. COX:** There is -- there is a harm to a voter who  
2 would be dissuaded from voting because they may not understand  
3 that they can comply with the requirements or that there is  
4 some inconvenience; but I would just point the Court to the *Lee*  
5 case, the *Crawford* case, the case out of the Seventh Circuit,  
6 all those cases that have held that the requirements to comply  
7 with a photo ID law that are consistent with the requirements  
8 that are in SB824 are not -- are not significant burdens and  
9 are mere inconveniences that a voter can comply with.

10           **THE COURT:** Is it a mere inconvenience that you've got  
11 to go to one, two or three places to figure out where you're  
12 going to get the ID and you have to take time off from work?  
13 They don't have jobs like you and me. A lot of these voters  
14 don't have those opportunities. They don't have  
15 transportation. They don't have all of the convenience -- it  
16 becomes a convenience if you've got a car. It becomes a  
17 convenience if you can take off any time. So I reject this  
18 idea that when we're talking about the right to vote and any  
19 kind of interference with the right to vote that we consider  
20 being unable to register, unable to get there are merely minor  
21 inconveniences.

22           **MR. COX:** I, of course, accept Your Honor's position  
23 on that. The -- I would just point to the numerous controlling  
24 cases that discuss the -- certain burdens on the -- on being  
25 able to cast a vote. A burden on being able to cast a vote is

1 not necessarily an invalid burden and the courts recognize  
2 this. The courts recognize that states must conduct elections  
3 based upon rules and any rule that you put up regarding  
4 election is going to burden somebody's vote in some way.

5 And I would also note that the inconveniences that  
6 Your Honor mentioned or the burdens that Your Honor mentioned  
7 about complying with the law in order to get an ID to vote,  
8 those inconveniences are addressed by the reasonable impediment  
9 provision. In fact, all of the issues that Your Honor  
10 mentioned are listed explicitly in the reasonable impediment  
11 reasons. So a voter does not have to come up with her own  
12 other reason, can simply check lack of transportation, could  
13 not get off work, any of the other reasons that Your Honor  
14 mentioned. So the law has to be considered in its totality and  
15 we would submit that the burdens are alleviated by the law's  
16 provisions.

17 On the balance of harms -- I will address the balance of  
18 harms and the public interest together, Your Honor. The voters  
19 of North Carolina in the 2018 election instructed their General  
20 Assembly to require photographic identification for in-person  
21 voting. Certainly it is not just the fact that there is a  
22 state law that is at issue. It's the fact that the voters put  
23 into their constitution a requirement that the General Assembly  
24 impose a photo ID requirement. So the public interest must be  
25 weighed in light of the constitutional enactment by the voters.

1 And it does bear repeating that we are well into the  
2 implementation of the photo ID law and the delay in getting to  
3 the preliminary injunction hearing to have the Court consider  
4 these matters should weigh into the analysis of the balance of  
5 equities and the public interest at stake here certainly after  
6 700,000 people have received a mailing, the State Board telling  
7 them that if they don't have the right ID they need to go get  
8 one or they can cast a reasonable impediment ballot, and the  
9 information that's going out to every single residential  
10 household in the next week or so informing them of the  
11 requirement to bring photo ID, with exceptions.

12 I'll rest at that; but I will add, because I think it's  
13 important for Your Honor to understand the election  
14 administration challenges the State Board faces, it is the case  
15 that we're in December prior to the first election that will be  
16 requiring photo ID. The State Board and the County Boards are  
17 not just now starting to implement this law. There are  
18 trainings that are taking place with County Board members via  
19 in-person and webinar over this month, and the County Boards  
20 are likely going to initiate their poll worker training this  
21 month. There will be different stages of poll worker training  
22 from the chief judges, the judges, and the precinct assistants  
23 that appear at the polls.

24 So we are in the throes of rolling this out and we have  
25 mentioned in the affidavit submitted by the executive director



1 that at the very latest -- from a technical perspective, at the  
2 very latest, the State Board would need to know by the end of  
3 December whether it should stop enforcing this law.

4 The reason for that is that there are changes that are  
5 hard-coded into the Elections information systems that cannot  
6 be undone when voting starts. What voting starts, you cannot  
7 make changes to the information system. Once the information  
8 system is loaded in with the coding for absentee ballots that  
9 must have a photo ID, provisional ballots that are going to  
10 address reasonable impediments, it's going to be difficult to  
11 ignore those and carry out elections at the precinct level with  
12 those elements. And perhaps even more importantly, the  
13 absentee ballots that get distributed in the second week of  
14 January are going to instruct voters that they must enclose a  
15 copy of their ID when they submit their ballot.

16 So we are -- we don't presume to tell the Court how quickly  
17 it should rule, but the State Board is a little nervous now  
18 about how quickly we are getting to its deadlines and when we  
19 really do need to make sure that our poll workers are  
20 conducting the election enforcing photo ID or not.

21 Thank you, Your Honor.

22 **THE COURT:** Thank you.

23 I want to hear from you on voter confusion. I'm not as  
24 concerned about the training of poll workers. I'm more  
25 concerned about those mailings that have gone out and are

1 scheduled to go out and the voter confusion that could be  
2 caused by that. So if you would address that for me.

3 **MS. SWAIN:** Yes, Your Honor.

4 I think this can be addressed very briefly. The status quo  
5 in North Carolina is that there is no photo voter ID. When you  
6 add a restriction that voters will face when they go to the  
7 polls, it has a different impact than when you take that  
8 restriction away. So in this instance, there may be confusion  
9 that could be caused by a mailing that's gone out that has  
10 indicated that to a narrow -- to around 700,000 voters that you  
11 need photo voter ID. That could be corrected by a second  
12 mailing that says you no longer need photo voter ID under the  
13 laws of this state, as has been the case for most of this  
14 state's history, except for one election cycle, March 2016.  
15 You will come to the polls and use signature attestation under  
16 penalty of perjury.

17 **THE COURT:** Let me ask you if I were to allow  
18 testimonial evidence, how long do you anticipate? Is that a  
19 day? Is that two days? What are we talking about?

20 **MS. SWAIN:** Yes, Your Honor.

21 We believe that if you -- if it would be helpful for the  
22 Court to hear from expert witnesses, that may take additional  
23 time. So our original estimate for the Court was going to be a  
24 day, possibly a day and a half if you heard both from expert  
25 witnesses and fact witnesses. I believe with the scope of what

1 we've covered here today that we could significantly limit that  
2 if it would be of help to the Court.

3 **THE COURT:** All right. Thank you.

4 Is there anything you care to say about that, about the  
5 hearing of oral testimony? I know you've got other things to  
6 do. That was in your brief.

7 **MR. COX:** Your Honor, you make the point very  
8 correctly that, you know, when the case calls, it is your  
9 priority.

10 The only thing that -- I would just reiterate that time is  
11 of the essence here. If Your Honor does allow live testimony,  
12 we just need it to happen sooner because the State Board needs  
13 to know what it's supposed to do.

14 **MS. SWAIN:** And if, Your Honor, I could briefly  
15 address that. We understand that time is of the essence and we  
16 do not want further delay by adding in an additional step if  
17 Your Honor does not believe that that's necessary. We at this  
18 point are neutral on the subject. We are happy to provide fact  
19 witnesses if it will be helpful. We are also happy to rest on  
20 the record.

21 **THE COURT:** Now, your fact witnesses wouldn't be -- it  
22 wouldn't be difficult for you to get your fact witnesses here.  
23 What about your expert witnesses?

24 **MS. SWAIN:** We -- I believe that our expert witnesses  
25 would work with us, recognizing that their schedules are

1 slightly more difficult because they are not in the state. But  
2 of course, Your Honor, we would do everything that we could to  
3 coordinate that and make it happen as quickly as Your Honor is  
4 ready to hear them.

5 **THE COURT:** All right. This is something that I do  
6 want to contemplate. I want to absorb what we heard today and  
7 make a decision; and if I make that decision, I'll make it  
8 quickly. But I will let you know either way pretty quickly.  
9 Anything further before we adjourn court today?

10 **MR. COX:** No, Your Honor.

11 **MS. SWAIN:** Nothing further from the Plaintiffs.  
12 Thank you.

13 **THE COURT:** All right. Let us adjourn court.

14 (Proceedings concluded at 4:29 p.m.)  
15

16 **C E R T I F I C A T E**

17 I, LORI RUSSELL, RMR, CRR, United States District Court  
18 Reporter for the Middle District of North Carolina, DO HEREBY  
CERTIFY:

19 That the foregoing is a true and correct transcript of the  
20 proceedings had in the within-entitled action; that I reported  
21 the same in stenotype to the best of my ability and thereafter  
reduced same to typewriting through the use of Computer-Aided  
Transcription.

22  
23 

24 Lori Russell, RMR, CRR  
25 Official Court Reporter

Date: 12/9/19